166-620 Argued

166-620.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~300~~ 12

THE NORTHERN PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JUNIUS G. SANDERS, WILBUR F. SANDERS, JAMES H. SANDERS, AND SAREPTA M. SANDERS.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Bulk

FILED APRIL 13, 1892.

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Supreme Court of States
166 U.S.
620-673.

Book.

(15,017.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 390.

THE NORTHERN PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JUNIUS G. SANDERS, WILBUR F. SANDERS, JAMES U. SANDERS, AND SAREPTA M. SANDERS.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

	Original.	Print.
Writ of error to United States circuit court of appeals	*a*	1
Citation and acknowledgment of service	*c*	2
Citation and marshal's return	1	2
Writ of error to United States circuit court	1	3
Transcript from United States circuit court for district of Montana	3	4
Complaint	4	4
Answer	6	7
Motion to transfer	12	11
Order to transfer	13	11
Certificate of clerk of State court	14	12
Amended complaint	15	13
Order granting leave to file answer to amended complaint	19	16
Answer to amended complaint	19	16
Demurrer to answer	30	24
Order setting demurrer for hearing	31	25
Order continuing hearing of demurrer	31	25
Order submitting demurrer	31	25
Order overruling demurrer	32	26
Opinion on demurrer	32	27

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 27, 1894.

	Original.	Print
Order granting time to file reply	49	39
Order granting time to file motion for rehearing	49	39
Motion for rehearing	49	39
Order continuing motion for rehearing	52	41
Order setting motion for rehearing down for hearing	52	41
Order granting rehearing, overruling demurrer, and for judgment	53	42
Judgment	53	42
Order fixing amount of bond on writ of error	54	43
Assignment of errors	54	44
Petition for writ of error	58	46
Bond for writ of error	59	47
Opinion on rehearing	60	48
Clerk's certificate	74	58
Order beginning argument	76	59
Order concluding argument and submitting cause	77	60
Opinion	78	60
Judgment	98	69
Assignment of errors	99	70
Petition for writ of error	104	72
Bond	106	72
Clerk's certificate	109	73

a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between The Northern Pacific Railroad Company, plaintiff in error, and Junius G. Sanders, Wilbur F. Sanders, James U. Sanders, and Sarepta M. Sanders, defendants in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within 60 days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 15th day of March, in the year of our Lord one thousand eight hundred and ninety-two.

Seal of the Supreme Court of the United States.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

b [Endorsed:] D. No. 7. N. P. R. R. Co., pl'ff in error, *v.* Junius G. Sanders *et al.* Writ of error. Filed Mar. 28, 1892. F. D. Monckton, clerk U. S. circuit court of appeals, 9th circuit.

The Answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States,

within mentioned, at the day and place within contained, in a certain sc-edule to this writ annexed, as within we are commanded.

By the court:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

c UNITED STATES OF AMERICA, *ss:*

To Junius G. Sanders, Wilbur E. Sanders, James U. Sanders, and Sarepta M. Sanders, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein The Northern Pacific Railroad Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this fifteenth day of March, in the year of our Lord one thousand eight hundred and ninety-two.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

Acknowledged service of this citation this 25th day of March, 1892, by a copy served on me.

W. F. SANDERS,
Att'y for Def'ts in Error.

d [Endorsed:] D. No. 7. Citation. Filed April 1st, 1892. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

1 UNITED STATES OF AMERICA, *ss:*

To Junius G. Sanders, Wilber E. Sanders, James U. Sanders, and Serepta M. Sanders, and W. F. Sanders and Adkinson & Miller, attorneys of record, Greeting:

You are hereby cited and admonished to be and appear at the United States circuit court of appeals for the ninth circuit, to be held at the city of San Francisco, in the State of California, thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Montana, wherein Northern Pacific Railroad Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 18th day of August, A. D. 1891.

[SEAL.] HIRAM KNOWLES,
U. S. Dist. Judge.

Service acknowledged August 20th, 1891.

ADKINSON & MILLER,
Attorneys for Defendants in Error.

Marshal's Return.

I have served this writ personally on Adkinson & Miller, attorneys of record, by delivering to them a copy of the same and showing them the original thereof, at Helena, Lewis & Clarke county, Montana, this 20th day of August, 1891.

W. F. FURAY,
U. S. Marshal,
By W. F. PARKER, *Deputy.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Mon-
2 tana, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Northern Pacific Railroad Company, plaintiff, and Junius G. Sanders, Wilber E. Sanders, James U. Sanders, and Serepta M. Sanders, defendants, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the ninth circuit, together with this writ, so that you have the same at San Francisco, State of California, thirty days from the date of signing the citation to said defendants herein, to wit, the seventeenth day of September, A. D. 1891, in the said United States circuit court of appeals to be there and then held, that, the record and proceedings aforesaid be inspected, the said United States circuit court of appeals may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 18th day of August, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred and sixteenth.

[SEAL.] GEO. W. SPROULE, *Clerk.*

The above writ of error is hereby allowed.

HIRAM KNOWLES,
U. S. Dist. Judge.

The Answer of the Judges of the Circuit Court of the United States for the Ninth Judicial Circuit for the District of Montana.

The record and all proceedings of the plaintiff wherein mention is within made, with all things touching the same, we certify under the seal of our said court to the United States circuit court of appeals for the ninth circuit, within mentioned, at the day and
3 place within contained in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[SEAL.] GEO. W. SPROULE, *Clerk.*

No. 62. In the circuit court of the United States, ninth circuit, district of Montana. N. P. R. R. Co. *vs.* J. G. Sanders *et al.* Writ of error. Filed Aug. 19, 1891. Geo. W. Sproule, clerk.

Copy deposited for the defendants in error in the clerk's office circuit court of the United States for the district of Montana.

Pleas in the circuit court of the United States for the ninth circuit, district of Montana, held at the United States court-room, in the city of Helena, in the district aforesaid, before the Hon. Hiram Knowles, United States district judge for the said district of Montana, on the 15th day of August, in the April term of said court, in the year of our Lord one thousand eight hundred and ninety-one, and of our Independence the one hundred and fifteenth.

GEORGE W. SPROULE,
Clerk U. S. Circuit Court, 9th Circuit, District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
JUNIUS G. SANDERS, WILBER E. SANDERS, JAMES U. SANDERS, and SEREPTA M. SANDERS, Defendants.

Be it remembered that on the 24th day of July, A. D. 1890, came the plaintiff, by its attorneys, and filed in the office of the clerk of the circuit court of the United States for the ninth circuit, district of Montana, the files of the record in said cause, which was by order transferred from the district court of the first judicial district, of the county of Lewis and Clarke, State of Montana, and which said record and files are in the words and figures following, to wit:

4 *Complaint.*

THE TERRITORY OF MONTANA, } ss:
County of Lewis and Clarke, }

In the District Court of the First Judicial District, Sitting for the Trial of Causes Arising under the Constitution and Laws of the United States.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
against
JUNIUS G. SANDERS, WILBER E. SANDERS, JAMES U. SANDERS, and SAREPTA M. SANDERS, Defendants.

Now comes The Northern Pacific Railroad Company plaintiff, and complains of the defendants, Junius G. Sanders, Wilbur E. Sanders, James U. Sanders, and Sarepta M. Sanders, for that the said plaintiff is a corporation created by and existing under an act of the Congress of the United States, entitled: "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound on the Pacific coast by the northern route," approved July 2, 1864, and upon its information and belief it says, that by the terms of said act there was granted to said plaintiff by the Congress every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of the line as said plaintiff should adopt through the territories of the United States, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office, and that the general route of the said road opposite to, perpendicular and by the premises hereinafter described, and the whole thereof was fixed and adopted by this plaintiff, within forty miles thereof, and a map and plat thereof filed in the office of the Commissioner of the General Land Office, on the 21st day of February, 1872, by means whereof the lands hereafter de-
5 scribed were withdrawn from pre-emption entry or sale, except by this plaintiff.

And thereafter, on the 6th day of July, 1882, the line of said railroad was definitely fixed by said plaintiff and a plat thereof filed in the office of the Commissioner of the General Land Office, within forty miles, to wit, two miles from the said premises. And the said plaintiff further says on its information and belief that all the premises hereinafter described were at the time the line of said railroad was so definitely fixed and said plat thereof filed in the office of the Commissioner of the General Land Office, perpendicular to, opposite, and by said premises and the whole thereof, on an odd-numbered section of public land not mineral, within forty miles, to wit, within two miles of said definite fixed railroad line to which the

United States then had full title, nor were they then reserved, sold, granted or otherwise appropriated, and they were then free from pre-emption and all other claims or rights, by means whereof plaintiff's said grant attached thereto and said premises then became, have ever since remained, and now are the property of this plaintiff to which plaintiff is entitled without let or hindrance from the said defendants; and thereafter, on the 7th day of September, 1883, the plaintiff completed its railroad, opposite, perpendicular and by said section of land, and commissioners were appointed by the President for that purpose who examined said twenty-five miles of railroad and telegraph line, opposite and perpendicular to which is the section of land aforesaid and said section of railroad was on the seventh day of September, 1883, duly approved by the President of the United States, whereby plaintiff became entitled to patents for said premises; but, so it is that heretofore, to wit, on the 10th day of May, 1888, the plaintiff being possessed thereof, the above-named defendants wrongfully and unlawfully, without the consent of this plaintiff, entered thereon and ousted plaintiff therefrom and from that time hitherto hath remained and yet are wrongfully and unlawfully in possession of section 21, township 10 N., range 3 W., in the county of Lewis and Clarke, in the Territory of Montana, to its damage in the sum of $100.00. Wherefore the plaintiff prays judgment for the restitution of the premises and for $100.00 and costs of suit.

WADE, TOOL & WALLACE,
Attorneys for Plaintiff.

6 TERRITORY OF MONTANA, } ss:
County of Lewis and Clarke, }

D. S. Wade, a witness of lawful age, says the plaintiff is a corporation, that affiant is the attorney thereof, that no other officer for plaintiff authorized by statute to verify pleadings thereof is within Montana, and that the facts set forth in the foregoing complaint are true to his best knowledge, information and belief, and further saith not.

D. S. WADE.

Subscribed and sworn to before me this 27th day of July, 1889.

W. E. CULLEN,
Notary Public.

(Endorsed:) In district court first district of Montana, Lewis and Clarke Co. N. P. R. R. Co., plaintiff, *versus* Junius G. Sanders *et al.*, defendants. Complaint. Filed July 27th. W. F. Parker, cl'k, by J. A. Carter, deputy. Wade, Toole & Wallace, attorneys for plaintiff. No. 491. Also endorsed: No. 62. In the circuit court of the United States, ninth circuit, district of Montana. N. P. R. R. Co. vs. J. G. Sanders *et al.* Filed Jul- 2, 1890. Geo. W. Sproule, clerk.

Answer.

TERRITORY OF MONTANA, } ss:
County of Lewis and Clarke, }

In the District Court of the First Judicial District, Sitting for the Trial of Causes Arising under the Constitution and Laws of the United States.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
JUNIUS G. SANDERS, WILBUR E. SANDERS, JAMES U. SANDERS, and SAREPTA M. SANDERS, Defendants.

Come now the defendants, Junius G. Sanders, Wilbur E. Sanders James U. Sanders and Serepta M. Sanders, in the above-entitled action, and as to the said complaint therein for the recovery of said land, admit that it is and at all times heretofore was not mineral land, and by way of affirmative denials of the allegation that
7 by means of the filing of the map of the general route in the office of the Commissioner of the General Land Office on the 21st day of February, 1872, the said lands were withdrawn from pre-emption entry or sale except by the said plaintiff, and of the allegation that at the time the line of said railroad was definitely fixed, perpendicular to and opposite said premises, to wit, July 6th, 1882, the United States had full title thereto and that they were not then sold, granted or otherwise appropriated, and that they were then free from pre-emption and other claims or rights, and that the grant of Congress by said act then attached thereto and said premises then became, have ever since remained, and now are the property of plaintiff, to which plaintiff was or is entitled, and of the allegation that plaintiff by reason of the construction of the railroad opposite, perpendicular to and by said premises, and the approval and acceptance of the President thereof, became entitled to a patent for said premises, and of the allegation that on the 10th day of May, 1888, or at any other time, the plaintiff was possessed thereof, and that the defendants wrongfully and unlawfully entered thereon and ousted plaintiff therefrom, and that they or either of them are or ever were wrongfully or unlawfully in possession thereof, or has damaged plaintiff in any sum whatever, and as to the northeast quarter of said section 21 say: that heretofore, to wit, on the 2nd day of August, 1880, Theodore H. Kleinschmidt, Edward W. Knight, Henry M. Parchen, Charles K. Wells, George P. Reeves, David H. Cuthbert, Cornelius Hedges and Stephen E. Atkinson, each being then and there a citizen of the United States, and each having theretofore filed upon a certain separate twenty acres of the northeast quarter of said section according to the laws of the Territory of Montana, and the mining usages and customs then in force in the office of the clerk and recorder, Lewis and Clarke county, Montana, and being then and in all respects qualified to enter mineral land under the laws of the United States, did enter into the possession of said

file upon the said quarter of said section in the land office of the United States in which district said land was situate, as mineral land and apply for a patent therefor, and did then and in due form file on said premises and make said application, and did then
8 and there make oath that they had discovered mineral thereon, and had located the eight several twenty-acre tracts comprising said northeast quarter of said section as mineral land, and then and there undertook and offered to maintain that the said premises were valuable for the gold contained therein, and were mineral lands of the United States to which they were entitled under the laws thereof, and that they had done the requisite amount of work thereon and were entitled to a patent therefor, which said application was then and there entered of record in said United States land office by the register and receiver thereof, and the same was set for a hearing upon their said proofs to be introduced and notice of such hearing was given in the proper newspaper and was in all things formal and the said application was continued from time to time and remained, and was by them asserted and pending on and after July 6th, 1882, the day when the line of said railroad at, opposite, perpendicular to and by said premises was definitely fixed, and the said applicants were then claiming, affirming and undertaking to maintain that the same was mineral land of the United States, to which they were entitled and was not land in quality such as was described in the grant to said plaintiff. And as to the northwest quarter thereof and by way of affirmative denials of the foregoing allegations of the plaintiff's complaint, these defendants say that heretofore, to wit, on the 12th day of August, A. D. 1880, George P. Reeves, Helen H. Reeves, Laura C. Ballau, John W. Eddy, Evelyn M. Eddy, Edward W. Knight, Theodosia M. Knight and Anna Natolia King, each being then and there a citizen of the United States, and each having theretofore filed upon a certain separate twenty acres of the northwest quarter of said section, according to the laws of the Territory of Montana, and the mining usages and customs then in force, in the office of the clerk and recorder, Lewis and Clarke county, Montana, and being then and in all respects qualified to enter mineral land under the laws of the United States, did enter into the possession of and file upon the said quarter of said section in the land office of the United States, in which said district said land was situate as mineral land, and apply for a patent therefor, and did then and in due form file on said premises and make such application, and did then and there make oath
9 that they had discovered mineral thereon, and had located the eight several twenty-acre tracts comprising said northwest quarter of said section, as mineral land, and then and there undertook and offered to maintain that the said premises were valuable for the gold contained therein, and were mineral lands of the United States to which they were entitled under the laws thereof, and that they had done the requisite amount of work thereon and were entitled to a patent therefor, which said application was then and there entered of record in said United States land office, by the register and receiver thereof, and the same was set for a hearing

upon their said proofs to be introduced, and notice of such hearing was given in the proper newspaper and was in all things formal and the said application was continued from time to time and remained and was by them asserted and pending on and after July 6th, 1882, the day when the line of said railroad at, opposite, perpendicular to and by said premises was definitely fixed and the said applicants were then claiming, affirming and undertaking to maintain that the same was mineral land of the United States to which they were entitled and was not land in quality such as was described in the grant to said plaintiff. And as to the southwest quarter thereof, and by way of affirmative denials of the foregoing allegations of plaintiff's complaint, these defendants say that heretofore, to wit, on the 19th day of February, A. D. 1881, Theodore H. Kleinschmidt, Henry M. Parchen, David H. Cuthbert, Stephen E. Atkinson, Lucius I. Rosecrans, Emma M. Parchen, Mary M. Kleinschmidt and Annie E. Cuthbert, each being then and there a citizen of the United States, and each having theretofore filed upon a certain separate twenty acres of the southwest quarter of said section, according to the laws of the Territory of Montana, and the mining usages and customs then in force, in the office of the clerk and recorder, Lewis and Clarke county, Montana, and being then and in all respects qualified to enter mineral land under the laws of the United States, did enter into the possession of and file upon the said quarter of said section in the land office of the United States in which district said land was situate, as mineral land, and apply for a patent therefor, and did then and in due form file on said premises and make said application, and did then and there make oath that they had discovered mineral thereon, and had located the eight several twenty-acre tracts comprising said southwest quarter of said section, as mineral land, and then and there undertook and offered to maintain that the said premises were valuable for the gold contained therein, and were mineral lands of the United States, to which they were entitled under the laws thereof, and that they had done the requisite amount of work thereon, and were entitled to a patent therefor, which said application was then and there entered of record in said United States land office by the register and receiver thereof, and the same was set for a hearing upon their said proofs to be introduced, and notice of such hearing was given in the proper newspaper, and was in all things formal, and the said application was continued from time to time, and remained and was by them asserted and pending on and after July 6th, 1882, the day when the line of said railroad at, opposite, perpendicular to, and by said premises, was definitely fixed, and the said applicants were then claiming, affirming and undertaking to maintain that the same was mineral land of the United States, to which they were entitled, and was not land in quality such as was described in the grant to said plaintiff.

And as to the southeast quarter thereof and by way of affirmative denials of the foregoing allegations of the plaintiff's complaint, these defendants say that heretofore, to wit, on the 13th day of March, A. D. 1880, Cornelius Hedges, Thomas A. H. Hay, Mary L. Guthrie,

Patrick Quinn, Louis A. Walker, William D. Wheeler, Edna L. Hedges, and George E. Carpenter, each being then and there a citizen of the United States, did each file upon a certain separate twenty acres of the southeast quarter of said section, according to the laws of the Territory of Montana, and the mining usages and customs then in force, in the office of the clerk and recorder of Lewis and Clarke county, Montana.

That on the 21st day of October, 1880, Cornelius Hedges purchased of Patrick Quinn all of his interest in said land and that on said 21st day of October, 1880, Russell B. Harrison purchased of Mary L. Guthrie all of her interest in said land, and that on
11 said 21st day of October, Louis A. Walker purchased of George E. Carpenter all of his interest in said land.

And as to the said southeast quarter thereof, and by way of affirmative denials of the foregoing allegations of the plaintiff's complaint, these defendants say that heretofore to wit, on the 19th day of February, A. D. 1881, Cornelius Hedges, Thomas A. H. Hay, Russell B. Harrison, Louis A. Walker, William D. Wheeler, and Edna L. Hedges, each being then and there a citizen of the United States, and being then and in all respects qualified to enter mineral land under the laws of the United States, did enter into the possession of and file upon the said quarter of said section in the land office of the United States in which district said land was situate, as mineral land, and apply for a patent therefor, and did then and in due form file on said premises and make said application, and did then and there make oath that they and their grantors had discovered mineral thereon and had located the eight several twenty-acre tracts, comprising said southeast quarter of said section, as mineral land, and then and there undertook and offered to maintain that the said premises were valuable for the gold contained therein, and were mineral lands of the United States, to which they were entitled under the laws thereof, and that they had done the requisite amount of work thereon, and were entitled to a patent therefor, which said application was then and there entered of record in said United States land office by the register and receiver thereof, and the same was set for a hearing upon their said proofs to be introduced, and notice of such hearing was given to the proper newspaper, and was in all things formal, and the said application was continued from time to time and remained and was by them asserted and pending on and after July 6th, 1882, the day when the line of said railroad at, opposite, perpendicular to and by said premises was definitely fixed, and the said applicants were then claiming, affirming and undertaking to maintain that the same was mineral land of the United States, to which they were entitled, and was not land in quality such as was described in the grant to said plaintiff.

And defendants further say that said plaintiff never had any possession of said premises, unless it was that possession or
12 livery of seizen which accompanies a grant by the Government, nor does said plaintiff claim nor has it any title, claim or possession other than that conferred by the act of Congress in said complaint recited.

Wherefore defendants pray that they may be dismissed without day and have judgment for their costs in this behalf expended.

J. U. SANDERS,
JOHN S. MILLER,
Attorneys for Defendants.

TERRITORY OF MONTANA, }
County of Lewis and Clarke, } *ss:*

Junius G. Sanders, a witness of lawful age, being first duly sworn, says: That he is one of the defendants in the above-entitled action, that he has read the foregoing answer and knows the contents thereof, and that the same is true, except as to such facts stated on information and belief, and as to those he believes it to be true, and further saith not.

JUNIUS G. SANDERS.

Subscribed and sworn to before me this 4th day of Sept., 1889.

JAMES U. SANDERS,
[NOTARIAL SEAL.] *Notary Public.*

(Endorsed:) 491. U. S. dist. court, 1st jud'l dist., Mont. N. P. R. R. Co. *vs.* Junius G. Sanders *et al.* Answer. Filed Oct. 7, '89. W. F. Parker, cl'k, by J. A. Carter, dep-ty. (Also endorsed:) No. 62. In the circuit court of the United States, ninth circuit, district of Montana. N. P. R. R. Co. *vs.* J. G. Sanders *et al.* Answer. Filed Jul-24, 1890. Geo. W. Sproule, clerk.

Motion for Transfer.

In the District Court of the First Judicial District in and for the County of Lewis and Clarke and State of Montana.

THE NORTHERN PACIFIC RAILROAD CO., Plaintiff, }
— }
JUNIUS G. SANDERS *et al.*, Defendants. }

Now comes the plaintiff in the above-entitled action by its attorneys, Toole and Wallace, and moves, petitions and requests
13 the court to transfer the said cause to the United States circuit court in and for the circuit of Montana.

Said application is made upon the ground, that it is a cause arising under the laws of the United States involving for the *the* plaintiff's rights a question of the construction of those laws, and of which the said circuit court, if established at the time of the commencement of the said action, would have had jurisdiction.

Said motion is based upon the complaint and answer in said cause.

TOOLE & WALLACE,
Attorneys for Plaintiffs.

(Endorsed:) 491. U. S. dist. court, first dist., Mont. N. P. R. R. Co. *vs.* Junius G. Sanders *et al.* Motion for transfer. Filed May

29, 1890. John Bean, clerk, by H. J. Cassidy, dept. Toole & Wallace, att'ys for pl'ff. (Also endorsed:) No. 62. In the circuit court of the United States, ninth circuit, district of Montana. N. P. R. R. Co. *vs.* J. G. Sanders *et al.* Motion. Filed July 24th, 1890. Geo. W. Sproule, clerk.

Order of Transfer.

In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

Done in open court this 3rd day of June, A. D. 1890.

NORTHERN PACIFIC R. R. Co.
vs.
JUNIUS G. SANDERS. } No. 491.

On petition of plaintiff, court ordered this cause transferred to United States circuit court.

(Signed) THOS. J. GALBRAITH,
Judge Presiding.

I hereby certify the foregoing to be a full, true and correct copy of the order to transfer this cause to the United States circuit court.

In witness whereof I hereunto set my hand and affix the seal of this court.

JOHN BEAN, *Clerk*,
[SEAL] By H. R. THOMPSON,
Deputy Clerk.

14 (Endorsed:) No. 62. In the circuit court of the United States, ninth circuit, district of Montana. N. P. R. R. Co. *vs.* J. G. Sanders *et al.* Order to transfer. Filed Jul- 24, 1890. Geo. W. Sproule, clerk.

Clerk's Certificate.

In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
JUNIUS G. SANDERS, WILBUR E. SANDERS, JAMES U. SANDERS, and SEREPTA M. SANDERS, Defendants.

1. Complaint.
2. Answer.
3. Motion for transfer.
4. Order to transfer.

I hereby certify that the above-enumerated papers and pleadings are all the papers and pleadings filed in the above-entitled cause in this office.

H. R. THOMPSON,
Deputy Clerk of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

(Endorsed:) No. 62. In the circuit court of the United States, ninth circuit, district of Montana. N. P. R. R. Co. *vs.* J. G. Sanders *et al.* Clerk's certificate. Filed July 24, 1890. Geo. W. Sproule, clerk.

And thereafter on said 24th day of July, A. D. 1890, said above-entitled cause was duly docketed in the said circuit court of the United States for the district of Montana, F. M. Dudley appearing as attorney for plaintiff, and Messrs. Sanders, Adkinson any Miller, for the defendants.

And thereafter, to wit, on the 6th day of November, A. D. 1890, plaintiff filed its amended complaint herein, which said amended complaint is in the words and figures following, to wit:

15 United States Circuit Court, District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
JUNIUS G. SANDERS, WILBUR E. SANDERS, JAMES U. SANDERS, and SEREPTA M. SANDERS, Defendants.

Now comes said plaintiff, and for cause of action against said defendant complains and alleges:

I.

That said plaintiff is a corporation, created by and organized and existing under an act of Congress of the United States, approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route," and those certain acts and joint resolutions supplemental thereto and amendatory thereof.

II.

That by the terms of said act of Congress approved July 2, 1864, plaintiff was authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, namely: Beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route, as should be determined by plaintiff, within the territory of the United States, on a line north of the 45th degree of latitude to some point on Puget sound. And there was granted to plaintiff by the Congress of the United States of America every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate section- per mile on each side of said railroad line, as plaintiff might adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passed through any State, and whenever on the line thereof the United States had full title, not reserved, sold, granted, or otherwise

appropriated, and free from pre-emption or other claims or rights at the time the line of said road should be definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office.

16 III.

That it was provided, in and by section six of the said act, that the President of the United States should cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route thereof was fixed, and as fast as should be required by the construction of said railroad, and that the odd sections of land thereby granted should not be liable to sale or entry or pre-emption, before or after they were surveyed, except by plaintiff, as provided in said act.

IV.

That plaintiff duly accepted the terms, conditions and impositions of said act, and signified such acceptance in writing, under its corporate seal, executed pursuant to the direction of its board of directors first had and obtained, and within two years after the passage of said act, to wit, December 29, 1864, served such acceptance on the President of the United States.

V.

That the general route of said railroad, extending through the State of Montana, was duly fixed February 21, 1872, and that the following-described land, to wit, section 21, in township 10 north of range 3 west, P. M. Montana, was on and within forty miles of the general route of said railroad so fixed as aforesaid; and that said land was, on said February 21, 1872, public land to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights.

VI.

That at the date of the passage of said act, July 2, 1864, and at the date of fixing said line of general route of said railroad, to wit, February 21, 1872, no part of the said section 21, township 10 north, range 3 west, was known mineral land, and that in truth and in fact said land was not mineral land, nor was any part of said last-described land with any exceptions from said grant.

VII.

17 That thereafter, to wit, July 6th, 1882, plaintiff definitely fixed the line of its said railroad, extending opposite to and past said section 21, township 10 north, range 3 west, and filed a plat thereof in the office of the Commissioner of the General Land Office. That said land is on and within forty miles of said line of railroad, so definitely fixed as aforesaid.

VIII.

That thereafter plaintiff duly constructed and completed that portion of said railroad and telegraph line extending on, over and along the line of definite location of said railroad so fixed as aforesaid; and thereupon the President of the United States appointed three commissioners to examine the same; and it appearing to the said commissioners that that portion of said railroad and telegraph line had been completed in a good, substantial and workmanlike manner, as in all respects required by said act of July 2, 1864, and the acts supplementary thereto and amendatory thereof, the said commissioners so reported to the President of the United States and said President of the United States duly accepted said line of railroad and telegraph so constructed and completed as aforesaid.

IX.

That at the date of so definitely locating said line of railroad, and of the filing of a plat thereof in the office of the Commissioner of the General Land Office, to wit, July 6th, 1882, the said section 21, township 10 north, range 3 west, was not known to be mineral land, and was, in fact and in truth, agricultural land.

That said land was on said day public land to which the United States had full title, not reserved, sold, granted or otherwise appropriated and free from pre-emption or other claims or rights.

X.

That heretofore, to wit, on the 10th day of May, 1888, plaintiff, being seized of said premises, the above-named defendants wrongfully and unlawfully, without the consent of this plaintiff, entered thereon and ousted plaintiff therefrom, and from that time hitherto hath remained, and yet are, wrongfully and unlawfully in possession of said section 21, township 10 north, of range 3 west, in
18 the county of Lewis & Clarke, in the State of Montana, to plaintiff's damage in the sum of one hundred dollars.

That the value of the said land is over ten thousand dollars.

Wherefore the plaintiff prays judgment for the restitution of the premises and for one hundred dollars and costs of suit.

F. M. DUDLEY,
Attorney for Plaintiff.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

F. M. Dudley, being first duly sworn, doth depose and say: That the plaintiff is a corporation, and, that affiant is an officer thereof, to wit, its general land attorney; that the facts set forth in the foregoing complaint are true to his best knowledge, information and belief.

F. M. DUDLEY.

Subscribed and sworn to before me this 15th day of October, A. D. 1890.

JOHN L. MOON,
[SEAL.] *Notary Public, Ramsey County, Minnesota.*

(Endorsed:) No. 62. In the circuit court of the United States, ninth circuit, district of Montana. N. P. R. R. Co. *vs.* J. G. Sanders *et al.* Amended complaint. Filed Nov. 6th, 1890. Geo. W. Sproule, clerk.

And thereafter the following further proceedings were had and entered of record herein, in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

Fifth day, November term, A. D. 1890.

TUESDAY, *November 11th*, 1890—10 a. m.

Court convened pursuant to adjournment.

Present: Honorable Hiram Knowles, United States district judge for the district of Montana.

19 NORTHERN PACIFIC R. R. Co. *vs.* J. G. SANDERS *et al.* } No. 62.

Defendants ask leave to file answer to amended complaint. Motion granted.

And thereafter, on said 11th day of November, A. D. 1890, defendants filed their answer to plaintiff's amended complaint, which said answer is in the words and figures following, to wit:

In the Circuit Court of the United States for the Ninth Circuit, District of Montana.

Removed from territorial court.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
JUNIUS G. SANDERS, WILBUR E. SANDERS, JAMES U. SANDERS, and SAREPTA M. SANDERS, Defendants.

Answer to Amended Complaint.

Now come the defendants, Junius G. Sanders, Wilbur E. Sanders, James U. Sanders and Sarepta M. Sanders, in the above-entitled action, and as to the said amended complaint for the recovery of the land described therein, to wit:

Section 21, in township 10 north, of range 3 west of the principal meridian of the State of Montana, by way of affirmative denial of

the allegations that the premises described in said amended complaint were not within any exception from said grant and of the allegation that said land was on the day of the date of the definite location of the line of plaintiff's said railroad perpendicular to, opposite and by said premises and the filing of a map thereof in the office of the Commissioner of the General Land Office, to wit, July 6, 1882, public land to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and was then free from pre-emption or other claims or rights, and the allegation that on the 10th day of May, 1888, the said plaintiff was seized of said premises and of the allegation that the entry on and withholding thereof by these defendants or any of them was wrongful or unlawful and of the allegation that thereby the plaintiff was dam-
20 aged in any sum whatever, confessing that said premises did not contain gold or other precious metals in paying quantities or in such quantity as to make the same, or any thereof, commercially valuable therefor, nevertheless say, as to the northeast quarter of said section 21, that heretofore, to wit, on the second day of August, 1880, Theodore H. Kleinschmidt, Edward W. Knight, Henry M. Parchen, Charles K. Wells, George P. Reeves, David H. Cuthbert, Cornelius Hedges, and Stephen E. Atkinson, each being then and there a citizen of the United States, and each having theretofore filed upon a certain separate twenty acres on the northeast quarter of said section according to the laws of the Territory of Montana, and the mining usages and customs then in force in the unorganized mining district in which said land was situated, and being then in all respects qualified to enter mineral land under the laws of the United States, did enter into the possession of, and did enter in the United States land office, and did file upon the said quarter of said section in the land office of the United States, at Helena, Montana, in which district said land was situate, as mineral land, and did apply for a patent therefor, and did then and there and in due form file an application to purchase said premises as such mineral land, and did then and there make oath before the register and receiver of said land office that they had discovered mineral thereon and had located the said quarter section as mineral land and claimed the same as such for the valuable mineral deposits therein, and that they had complied with chapter 6 of title XXXII of the Revised Statutes of the United States, which said application was so filed in the land office at Helena, Montana, under the oath of the said applicants, showing that they had complied with the law aforesaid and describing the same by legal subdivisions, and they did then and there prior to filing said application post in a conspicuous place, on the claim embraced therein, a copy of said application and notice hereinafter mentioned, which said notice did then and there remain conspicuously posted on said premises during the period of publication hereafter mentioned, and they did then and there file with their said application in said land office, an affidavit of two persons that such notice had been so duly posted and did then
21 and there file a copy of said notice in the land office with the register and receiver thereof, and by said application they

requested to be permitted to purchase the same as mineral land, and they then and there undertook and offered to maintain by proof that the said premises were valuable for the gold contained therein and were mineral lands of the United States, to which they were entitled under the laws thereof, and that they had done the requisite amount of work thereon, to wit, work of the value of five hundred dollars, and were entitled to a patent therefor, which said application and affidavit and notice were then and there entered of record in said United States land office by the register and receiver thereof, and the said application was set for a hearing upon their said proofs to be produced and notice of such hearing in due form of law was given by the register and receiver in the proper newspaper designated for that purpose, and was duly published therein, which said entry, application, affidavits and notice were in all respects formal according to law and the said application was set down for a hearing in said land office by the register and receiver thereof at the expiration of the period of time prescribed in said notice and at the date at which the same was so set, the said plaintiff having theretofore filed a protest against the perfection of the said entry, for the reason, as claimed by said plaintiff, that the same was not mineral land or commercially valuable for the gold or other precious metals therein contained; the said application was continued thereafter by the consent of parties or otherwise, from time to time, and was asserted and remained pending on the 6th day of July, 1882, and thereafter the said applicants on said 6th day of July, 1882, and thereafter as theretofore, averring their ability to prove that the said land was commercially valuable for the gold therein contained, and was mineral land within the definition of that phrase contained in the act granting lands to said plaintiff mentioned in said amended complaint, and the said applicants were on the date last aforesaid claiming, affirming and undertaking to maintain on their application for said premises in said land office, that the same was mineral land of the United States, to which they were entitled thereunder, and was not land in quality such as was described in the grant to the said plaintiff.

22 And as to the northwest quarter of said section and by way of affirmative denials of the foregoing allegations of the plaintiff's amended complaint, these defendants say that heretofore, to wit, on the 12th day of August, A. D: 1880, George P. Reeves, Helen H. Reeves, Laura C. Ballou, John W. Eddy, Evelyn M. Eddy, Edward W. Knight, Theodosia M. Knight and Anna Natolia King, each being then and there a citizen of the United States, and each having theretofore filed upon a certain separate twenty acres on the northwest quarter of said section according to the laws of the Territory of Montana, and the mining usages and customs then in force in the unorganized mining district in which said land was situated, and being then in all respects qualified to enter mineral land under the laws of the United States, did enter into the possession of and did enter in the United States land office and did file upon the said quarter of said section in the land office of the United States at Helena, Montana, in which district said land was situate, as min-

eral land, and did apply for a patent therefor, and did then and there and in due form file an application to purchase said premises as such mineral land, and did then and there make oath before the register and receiver of said land office, that they had discovered mineral thereon and had located the said quarter section as mineral land and claimed the same as such for the valuable mineral deposits therein, and that they had complied with chapter 6 of title XXXII of the Revised Statutes of the United States, which said application was so filed in the land office at Helena, Montana, under the oath of the said applicants showing that they had complied with the law aforesaid and describing the same by legal subdivisions, and that they did then and there prior to filing said application post in a conspicuous place on the claim embraced therein a copy of said application and notice hereinafter mentioned, which said notice did there remain conspicuously posted on said premises during the period of publication hereafter mentioned, and they did then and there file with their said application in said land office, an affidavit of two persons that such notice had been so duly posted and did then and there file a copy of said notice in the land office with the register and receiver thereof, and by said application they requested to be permitted to purchase the same as mineral land, and they then
23 and there undertook and offered to maintain by proof that the said premises were valuable for the gold contained therein and were mineral lands of the United States to which they were entitled under the laws thereof, and that they had done the requisite amount of work thereon, to wit, work of the value of five hundred dollars, and were entitled to a patent therefor, and which said application and affidavit and notice were then and there entered of record in the said United States land office by the register and receiver thereof, and the said application was set for a hearing upon their said proofs to be produced and notice of such hearing in due form of law was given by the register and receiver in the proper newspaper designated for that purpose, and was duly published therein, which said entry, application, affidavits and notice were in all respects formal according to law, and the said application was set down for a hearing in said land office by the register and receiver thereof, at the expiration of the period of time prescribed in said notice, and at the date at which the same was so set the said plaintiff having theretofore filed a protest against the perfection of the said entry for the reason, as claimed by said plaintiff, that the same was not mineral land or commercially valuable for the gold or other metals therein contained, the said application was continued thereafter by consent of parties or otherwise, from time to time, and was asserted and remained pending on the 6th day of July, 1882, and thereafter, the said applicants on the said 6th day of July, 1882, and thereafter as theretofore averring their ability to prove that the said land was commercially valuable for the gold therein contained and was mineral land within the definition of that phrase contained in the act granting lands to said plaintiff mentioned in said amended complaint, and the said applicants were on the date last aforesaid claiming, affirming and undertaking to maintain on their applica-

tion for said premises in said land office that the same was mineral land of the United States to which they were entitled thereunder and was not land in quality such as was described in the grant to the said plaintiff.

And as to the southwest quarter of said section and by way of affirmative denials of the foregoing allegations of the plaintiff's amended complaint these defendants say that heretofore,
24 to wit, on the 19th day of February, A. D. 1881, Theodore H. Kleinschmidt, Henry M. Parchen, David H. Cuthbert, Stephen E. Atkinson, Lucius I. Rosecrans, Emma M. Parchen, Mary M. Kleinschmidt and Annie E. Cuthbert, each being then and there a citizen of the United States, and each having theretofore filed upon a separate twenty acres on the southwest quarter of said section according to the laws of the Territory of Montana, and the mining usages and customs then in force in the unorganized mining district in which said land was situated, and being then in all respects qualified to enter mineral land under the laws of the United States, did enter into the possessson of and did enter in the United States land office, and did file upon the said quarter of said section in the land office of the United States at Helena, Montana, in which district said land was situate, as mineral land, and did apply for a patent therefor, and did then and there, and in due form, file an application to purchase said premises as such mineral land, and did then and there make oath before the register and the receiver of said land office that they had discovered mineral thereon and had located the said quarter section as mineral land and claimed the same as such for the *the* valuable mineral deposits therein, and that they had complied with chapter 6 of title XXXII of the Revised Statutes of the United States, which said application was so filed in the land office at Helena, Montana, under the oath of the said applicants showing that they had complied with the law aforesaid and describing the same by legal subdivisions, and they did then and there prior to filing said application post in a conspicuous place on the claim embraced therein a copy of said application and notice hereinafter mentioned, which said notice did there remain conspicuously posted on said premises during the period of publication hereafter mentioned, and they did then and there file with their said application in said land office, an affidavit of two persons that such notice had been so duly posted, and did then and there file a copy of said notice in the land office with the register and receiver thereof, and by said application they requested to be permitted to purchase the same as mineral land and they then and there undertook and offered to maintain by proof that the said premises were valuable for the gold contained therein and were
25 mineral lands of the United States to which they were entitled under the laws thereof, and that they had done the requisite amount of work thereon, to wit, work of the value of five hundred dollars, and were entitled to a patent therefor, which said application and affidavit and notice were then and there entered of record in the said United States land office by the register and receiver thereof, and the said application was set for a hearing upon

their said proofs to be produced and notice of such hearing in due form of law was given by the register and receiver in the proper newspaper designated for that purpose and was duly published therein, which said entry, application, affidavits and notice were in all respects formal according to law and the said application was set down for a hearing in said land office by the register and receiver thereof at the expiration of the period of time prescribed in said notice and at the date at which the same was so set the said plaintiff having theretofore filed a protest against the perfection of the said entry, for the reason, as claimed by said plaintiff, that the same was not mineral land or commercially valuable for the gold or other metals therein contained, the said application was continued thereafter by consent of parties or otherwise from time to time and was asserted and remained pending on the 6th day of July, 1882, and thereafter the said applicants on the said 6th day of July, 1882, and thereafter as theretofore averring their ability to prove that the said land was commercially valuable for the gold therein contained and was mineral land within the definition of that phrase contained in the act granting lands to said plaintiff mentioned in said amended complaint, and the said applicants were on the date last aforesaid claiming, affirming and undertaking to maintain on their application for said premises in said land office that the same was mineral land of the United States to which they were entitled thereunder and was not land in quality such as was described in the grant to the said plaintiff.

And as to the southeast quarter of said section, and by way of affirmative denials of the foregoing allegations of the plaintiff's amended complaint, these defendants say that heretofore, to wit, on the 13th day of March, 1880, Cornelius Hedges, Thomas A. H. Hay, Mary L. Guthrie, Patrick Quinn, Louis A. Walker, William
26 D. Wheeler, Edna L. Hedges and George E. Carpenter, each being then and there a citizen of the United States, did each file upon a certain separate twenty acres of the southeast quarter of said section, according to the laws of the Territory of Montana, and the mining usages and customs then in force in the office of the clerk and recorder of Lewis and Clarke county, Montana, that thereafter on the 21st day of October, 1880, Cornelius Hedges purchased of Patrick Quinn all of his interest in said land, and that on said 21st day of October, 1880, one Russell B. Harrison purchased of Mary L. Guthrie all of her interest in said quarter of said section, and that on said 21st day of October, Louis A. Walker purchased of George E. Carpenter all of his interest in said quarter section, and thereupon, heretofore, to wit, on the 19th day of February, 1881, the said Cornelius Hedges, Thomas A. H. Hay, Russell B. Harrison, Louis A. Walker, William D. Wheeler, and Edna L. Hedges, each being then and there a citizen of the United States, and being in all respects qualified to enter mineral land under the laws of the United States, did enter into the possession of and did enter in the United States land office, and did file upon the said quarter of said section in the land office of the United States at Helena, Montana, in which district said land was situate, as mineral land, and did apply for a

patent therefor, and did then and there and in due form file an application to purchase said premises as such mineral land, and did then and there make oath before the register and receiver of said land office that they had discovered mineral thereon, and had located the said quarter section as mineral land and claimed the same as such for the valuable mineral deposits therein, and that they had complied with chapter 6 of title XXXII of the Revised Statutes of the United States, which said application was so filed in the land office at Helena, Montana, under the oath of the said applicants, showing that they had complied with the law aforesaid and describing the same by legal subdivisions, and they did then and there prior to filing said application post in a conspicuous place on the claim embraced therein a copy of said application and notice hereinafter mentioned, which said notice did there remain conspicuously posted on said premises during the period of publication
27 hereafter mentioned, and they did then and there file with their said application in said land office an affidavit of two persons that such notice had been so duly posted and did then and there file a copy of said notice in the land office with the register and receiver thereof and by said application they requested to be permitted to purchase the same as mineral land and they then and there undertook and offered to maintain by proof that the said premises were valuable for the gold contained therein and were mineral lands of the United States to which they were entitled under the laws thereof, and that they had done the requisite amount of work thereon, to wit, work of the value of five hundred dollars, and were entitled to a patent therefor, which said application and affidavit and notice were then and there entered of record in the said United States land office by the register and receiver thereof, and the said application was set for a hearing upon their said proofs to be produced and notice of such hearing in due form of law was given by the register and receiver in the proper newspaper designated for that purpose and was duly published therein, which said entry, application, affidavits and notice were in all respects formal according to law and the said application was set down for a hearing in said land office by the register and receiver thereof at the expiration of the period of time prescribed in said notice and at the date at which the same was so set the said plaintiff having theretofore filed a protest against the perfection of the said entry for the reason as claimed by said plaintiff, that the same was not mineral land or commercially valuable for the gold or other metals therein contained, the said application was continued thereafter by consent of parties or otherwise from time to time and was asserted and remained pending on the 6th day of July, 1882, and thereafter the said applicants on the said 6th day of July, 1882, and thereafter as theretofore averring their ability to prove that the said land was commercially valuable for the gold therein contained and was mineral land within the definition of that phrase contained in the act granting lands to said plaintiff mentioned in said amended complaint, and the said applicants were on the date last aforesaid claim-

ing, affirming and undertaking to maintain on their applica-
28 tion for said premises in said land office that the same was mineral land of the United States to which they were entitled thereunder and was not land in quality such as was described in the grant to the said plaintiff.

And defendants further say that said plaintiff never had any possession of said premises, unless it was that possession or livery of seizen which accompanies a grant by the Government, nor does said plaintiff claim nor has it any title, claim or possession other than that conferred by the act of Congress in said complaint recited.

And as to the said proceedings, and each and all of them, in the office of the county clerk and recorder of said county of Lewis and Clarke, Montana, in which county said premises are situate and in the United States land office at Helena, aforesaid, they were in the form prescribed by law for the claim and entry of placer mining claims, and thereafter, to wit, on the 4th day of August, 1887, the said plaintiff presented to the said register and receiver a list of lands selected by it as having been granted to it by the act aforementioned and claimed by it thereunder, to be approved to the end that the said premises in said list described might — certified to it for patent, which list includes said section twenty-one, but to approve said list or certify said lands to said company the said register and receiver and the land department of the United States refused because of the existence on the 6th day of July, 1882, of the foregoing claims to the same as mineral lands. On the 21st day of February, 1872, said plaintiff filed a map of the general route of its said road in the office of the Commissioner of the General Land Office.

That thereafter the Commissioner of the General Land Office, under the directions of the Secretary of the Interior, duly prepared a plat showing that portion of the preliminary or general route of the said Northern Pacific Railroad extending through the United States land district of Helena, Montana, and designated thereon lines showing the limits of the land grant to the said plaintiff, for forty miles in width on each side of said line of general route; thereafter to wit, April 22, 1872, the said Commissioner of the General Land Office, under the directions of the Secretary of the Interior, duly transmitted said diagram to the register and receiver of the
29 United States district land office at Helena, Montana, with the following letter of instructions:

"DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *April* 22, 1872.

Register and receiver, Helena, Mont.

GENTLEMEN: I transmit herewith diagram showing the designated route of the Northern Pacific railroad under the act of July 2, 1864, and, by direction of the Secretary of the Interior, you are hereby directed to withdraw from sale or location, pre-emption or homestead entry, all the surveyed and unsurveyed odd-numbered sections of public lands falling within the limits of 40 miles as designated on this map. You will also increase in price to $2.50 per acre the

even-numbered sections within these limits, and dispose of them at that ratability, and under the pre-emption laws only, no private entry of the same being admissable until these lands have been offered at the increased price. This order will take effect from the date of its receipt by you; and you are requested to acknowledge, without delay, the time of its receipt.

Very respectfully,

(Signed) WILLIS DRUMMOND,
Commissioner."

That the said letter of instructions and diagram were received at the United States district land office at Helena, Montana, May 6, 1872.

Wherefore defendants pray judgment for their costs.

ADKINSON & MILLER,
For Def'ts.

STATE OF MONTANA, } ss:
County of Lewis and Clarke, }

James U. Sanders, a witness of lawful age, being first duly sworn, says: That he is one of the defendants in the above-entitled action, that he has read the foregoing answer and knows the contents thereof, and that the same is true, except as to such facts stated on information and belief, and as to those he believes it to be true, and further saith not.

JAMES U. SANDERS.

30 Subscribed and sworn to before me this 11th day of November, 1890.

GEORGE W. SPROULE,
Clerk U. S. Circuit Court, District of Mont.

(Endorsed:) No. 62. In the circuit court of the United States, ninth circuit, district of Montana. N. P. R. R. Co. *vs.* J. G. Sanders *et al.* Answer to amended complaint. Filed Nov. 11th, 1890. Geo. W. Sproule, clerk.

And thereafter on the 12th day of November, A. D. 1890, plaintiff filed its demurrer to said answer to said amended complaint, which said demurrer is in the words and figures following, to wit:

United States Circuit Court, District of Montana.

THE NORTHERN PACIFIC R. R. Co., Plaintiff, }
vs.
JUNIUS G. SANDERS *et al.*, Defendants. }

Demurrer.

Now comes the plaintiff by his attorney and demurs to the answer to the amended complaint herein for the reason that said answer

does not state facts sufficient to constitute a defence or counter-claim.

F. M. DUDLEY,
Attorney for Plaintiff.

(Endorsed:) No. 62. In United States circuit court, ninth circuit, district of Montana. N. P. R. R. Co. *vs.* J. G. Sanders. Demurrer. Filed Nov. 12th, 1890. Geo. W. Sproule, clerk. F. M. Dudley, attorney for plaintiff.

And thereafter on the 20th day of November, A. D. 1890, the following further proceedings were had and entered of record in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

Thirteenth day of November term, A. D. 1890.

THURSDAY, *November 20th*—10 a. m.

Court convened pursuant to adjournment.

Present: Honorable Hiram Knowles, United States district judge for the district of Montana.

31 No. 62. Northern Pacific R. R. Co. *vs.* J. G. Sanders *et al.* Demurrer to the answer in this cause is set for hearing Nov. 21, 1890, at 10 a. m.

And thereafter on the 22nd day of November, A. D. 1890, the following further proceedings were had and entered of record in the above-entitled cause, to wit:

In the United States Circuit Court, Ninth Circuit, for the District of Montana.

Fifteenth day, November term, A. D. 1890.

SATURDAY, *November 22nd*—10 a. m.

Court convened pursuant to adjournment.

Present: Honorable Hiram Knowles, United States district judge for district of Montana.

NORTHERN PACIFIC R. R. Co.
vs.
J. G. SANDERS *et al.*
} No. 62.

This cause came on for hearing this day on the demurrer to answer of defendants, and after argument by F. M. Dudley for pl'ff, and W. F. Sanders for def'ts. the further hearing was continued until Monday, Nov. 24th, 1890.

And thereafter on the 25th day of November, A. D. 1890, the following further proceedings were had and entered of record in said cause in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

Seventeenth day, November term, A. D. 1890.

TUESDAY, *November 25th*, 1890—10 a. m.

Court convened pursuant to adjournment.

Present: Honorable Hiram Knowles, United States district judge for the district of Montana.

NORTHERN PACIFIC RAILROAD CO. *vs.* J. G. SANDERS *et al.* } No. 62.

The further argument of the demurrer in this cause was proceeded with, and submitted to the court for consideration and decision.

32 And thereafter on the 6th day of April, A. D. 1891, the following further proceedings were had and entered of record in said cause in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

First day, April term, A. D. 1891.

At a stated term, to wit, the April term A. D. 1891, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of Montana, held at the city of Helena, in said district, at the court-room of said court, on Monday, the 6th day of April, A. D. 1891.

Present: The Honorable Hiram Knowles, United States district judge for the district of Montana; Elbert D. Weed, Esq., United States attorney; Wm. F. Furay, United States marshal; Geo. W. Sproule, clerk.

NORTHERN PACIFIC RAILROAD COMPANY *vs.* J. G. SANDERS *et al.* } No. 62.

This cause, heretofore submitted to the court for consideration and decision on the demurrer to the answer, came on this day for the decision and judgment of the court.

Whereupon after due consideration it is ordered that said demurrer to the answer be and the same is hereby overruled.

And thereafter and on said day, to wit, April 6th, 1891, the opinion of the court in said cause overruling said demurrer was filed, which said opinion is in the words and figures following, to wit:

Opinion.

In the United States Circuit Court, District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY
vs.
J. G. SANDERS *et al.*

KNOWLES, *J.:*

The complaint in this case sets forth a cause of action in
33 the nature of ejectment to recover the possession of section 21, in township 10 north, range 3 west, in Lewis and Clarke county, Mont. In it enough is set forth to show that plaintiff received from the United States a grant of 20 alternate sections of land per mile on each side of its road in Montana as definitely fixed. This land was to be such as at the time plaintiff's road should be definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office the United States had full title to, and which was not reserved, sold, granted, or otherwise appropriated, and was free from pre-emption or other claims or rights. It is set forth that the land is non-mineral, and an alternate section within the limits of said grant agricultural in character, and was on the 6th day of July, 1882, public land to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights. The answer admits that the land is non-mineral; that defendants have entered upon said premises, and are now withholding the possession thereof from plaintiff; and then denies the allegations of the complaint that the said land was public land to which the United States had full title and was free from pre-emption or other claims or rights not reserved, sold, granted, or otherwise appropriated at the time the route of plaintiff's road was definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office by setting up affirmatively (1) that on the 2d day of August, 1880, Theodore H. Kleinschmidt, Edward W. Knight, and six others located under the mining laws of the United States and the laws of the Territory of Montana, as eight distinct mining claims, the northeast quarter of said section 21; (2) that on the 12th day of August, 1880, George P. Reeves, Helen H. Reeves, and six others located under the mining laws of the United States and the laws of the Territory of Montana, as eight distinct mining claims, the northwest quarter of said section 21; (3) that on the 19th day of February, 1881, Theodore H. Kleinschmidt, Henry M. Parchen, and six others located under the mining laws of the United States and the laws of the Territory of Montana, as eight separate mining claims, the southwest quarter of said section 21; (4) that on the 13th day of March,
1880, Cornelius Hedges, Thomas A. H. Hay, and six others
34 located according to the mineral laws of the United States and the laws of the Territory of Montana, as eight separate mining claims, the southeast quarter of said section 21; that each of the locators above named were citizens of the United States; that

afterwards the above-named parties made application to patent said lands as mineral in the United States land office at Helena, Mont., and for this purpose filed all the necessary affidavits and notices and proofs required in such cases; that afterwards plaintiff in this case protested against the issuing of patents to said parties on the ground that the same was non-mineral in character, and not subject to be patented as mineral land; that on account of this protest a contest was inaugurated in said land office as to the right of said parties to a patent for said premises; that said contest existed and was pending on the 6th day of July, 1882, when the line of plaintiff's road was definitely fixed opposite to said land, and a plat thereof filed in the office of the Commissioner of the General Land Office. To this answer plaintiff filed its demurrer, setting forth that the answer does not state facts sufficient to constitute a defense to the cause of action set up in the complaint. This brings up for consideration the question whether or not a mining location made according to law upon an odd section of land within the limits of the Northern Pacific Railroad Company's grant, and an application made by the locators thereof to patent such claim in the United States land office as mineral land, and claiming the same to be such, and filing all the necessary proofs of location, mineral character, and work accompanying such application as is required by law and the rules of the Land Department, and which is pending, and a contest in regard to the right of said parties to patent the same is existing in the United States land office at the time the railroad of said company was definitely fixed, is sufficient to take such land out of such grant, although admitted now to have been non-mineral in character, and hence not subject to be located or patented as mineral land. That portion of the act making the land grant to the Northern Pacific Railroad Company, which bears upon this point, is as follows:

"There be and is hereby granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph lines to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of said railway, every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office."

It is urgued by defendants that it sufficiently appears from their answer that at the time plaintiff's road was definitely fixed a claim had attached to this land which excepted it from plaintiff's grant. Plaintiff urgues (1) that at the time of the location of this land as

mining claims no claims could attach to this land, because the same was at that time withdrawn from settlement or sale by virtue of section 6 of the act above referred to, as within 40 miles of the general route of its road as located in 1872; (2) that, considering there was this claim, it was not a valid claim, as it is admitted it was for mineral purposes upon agricultural land. Several cases were cited by plaintiff in support of its first proposition, which I do not feel called upon to review, because I have found no railroad grants to other railroad companies which correspond in all particulars with that of plaintiff upon that point. The section of the act of Congress in which is found plaintiff's grant, which it is claimed withdraws this land entirely from market after the general route of plaintiff's road was located, is as follows:

"The President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided in this act."

The provisions corresponding to this in the act granting to
36 the Union Pacific Railroad Company their land is found in section 7 of that act, and is as follows:

"That within two years after the passage of this act said company shall designate the general route of said road as near as may be, and shall file a map of the same in the Department of the Interior; whereupon the Secretary of the Interior shall cause the land within fifteen miles of said designated route to be withdrawn from pre-emption, private entry, and sale; and when any portion of said route shall be finally located the Secretary of the Interior shall cause the said lands hereinbefore granted to be surveyed and set off as fast as may be necessary for the purposes herein named." See 12 St. U. S., 493.

This act was so amended as to make "fifteen" in this section read "twenty." 13 *id.*, 358. It will be seen by an examination of this section as amended that all lands, whether odd or even numbered sections, for 20 miles on each side of the general route of said company's road, are withdrawn from pre-emption, private entry, and sale at the time of the fixing of the general route of that company's railroad, without any reference as to whether they are granted lands or not. The Central Pacific Railroad Company's grant is the same as the Union Pacific Railroad Company's and subject to the same limitations. There is no doubt about the provisions of the Union Pacific Railroad and Central Pacific Railroad act requiring all lands, whether granted or not, to be withdrawn at the time the general route of the road is fixed within the limits of its grant. The act making the land grant of the Atlantic & Pacific Railroad Company, which is the same as the grant to the Southern Pacific Railroad Company, is also materially different from that of the act making plaintiff's grant. The section in the act making the grant is the third, and is as follows:

"That there be and is hereby granted to the Atlantic & Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitons of war, and public stores over the route of said line of railway and its branches, every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the Territories
37 of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof filed in the office of the Commissioner of the General Land Office." 14 St. U. S., 294.

It will be seen by a comparison of this grant with that of plaintiff's that in the former the grant takes effect when the line of the road is designated by the filing of the plat thereof in the office named; in the latter, only when the line is definitely fixed, and a plat thereof filed in the proper office. I do not see but that in the former a plat designating the general route of that road, filed in the proper office, would cause the grant to become fixed, while in the latter a definite route has to be fixed. The provision in the Atlantic & Pacific Railroad Company's grant, which is similar to that of the sixth section in plaintiff's grant, and withdraws lands along the route of that road from sale, is as follows:

"That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad, and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided by this act."

If I understand the case of Railway Co. *v.* Orton, 32 Fed. Rep. 458, the position is that the filing a plat designating even the general route of that company's road fixed the grant, and the law withdrawing the lands granted took effect. The decisions upon the construction of that grant, then, upon this point,—and certainly those that pertain to the Union and Central Pacific Railroad Companies,—do not apply in this case. They are not even analogous upon this point. Plaintiff, however, calls the attention of the court with a considerable confidence to the cases of Buttz *v.* Railroad Co., 119 U. S. 55, 7 Sup. Ct. Rep. 100, and Denny *v.* Dodson, 13 Sawy. 68, 32 Fed. Rep. 899, upon this point. It cannot be denied
38 that there is language in both cases which supports plaintiff's view; but in the first case, at least, the language used was not necessary to the decision of the question at issue. In the first case it appears from the statement of facts that one Peronto, under whom, I suppose, plaintiff Buttz claimed, settled upon the land in dispute on the 5th day of October, 1871, while the land was situate

in the Indian country. The United States statutes prohibits any settlement upon land in the Indian country. Peronto was, then, a trespasser there. On either June 19, 1873, or June 22, 1874, the Indian title was extinguished by treaty with the United States, and Peronto was found upon the land at that time. But on the 26th day of May, 1873, some 25 days before, in any event, the Indian title was extinguished, the Northern Pacific Railroad Company filed with the Commissioner of the General Land Office a plat of the route of their road as definitely fixed across the country upon such a line as would include the land Peronto had settled upon within its grant. The court held that, notwithstanding this Indian title of occupancy, the grant to plaintiff took effect upon the filing of this plat. As the said Peronto or Buttz had no settlement which could be at all recognized in law, up to this time the grant of the railroad company was prior to any rights that either could claim. There could be no doubt but when that grant gained precision by the definite fixing of the route of plaintiff's road the land in controversy in that case was withdrawn from sale or homestead rights, or any other rights that could attach to the same subsequent to that definite fixing of the line of plaintiff's road—first, because it had already been sold to plaintiff; and, second, because at that time, by virtue of the provisions of section 6, it was excluded from sale or pre-emption or homestead settlement because the permanent route of the road had been fixed. It appears, however, that the general route of the road of plaintiff was fixed and a plat thereof filed on the 21st day of February, 1872, some four months after Peronto's settlement. The court proceeds to say that this act withdrew the land from the market. It had not reached that condition when it was in the market at that time. The statute preventing settlement upon it as within the Indian country prevented it. When it had, the definite route of the road had been fixed, and there
39 was no function for the provisions of section 6 to perform before that time, considering that it is liable to the interpretation given it by the court. As to the interpretation of section 6 the very eminent jurist who delivered the opinion said:

"When the general route is thus fixed in good faith, and information thereof given to the Land Department by filing a map thereof with the Secretary of the Interior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side."

It will be seen here that he makes the withdrawal of the land from sale, etc., to depend upon the filing of the map of the general route with the Secretary of the Interior. The law does not authorize the filing of any such map in plaintiff's grant. It does not say the withdrawal shall take effect upon the filing of any such map. In the act making the grant to the Union and Central Pacific Railway Companies there is a provision for filing such a map, and the withdrawal of all the land from market within the limits of the grant to these companies. The general language of the opinion would also indicate that it was the opinion of the court that section 6 of plaintiff's grant would withdraw all odd sections of land from the market,

whether mineral or not, or whether homestead or pre-emption claims had attached to the same or not prior to the designating this general route. That certainly was not contemplated. It would appear that the eminent jurist in writing that opinion had in mind more the bearing of the provisions of the act making grants to the Union Pacific and Central Pacific Railway Companies, with which he was undoubtedly very familiar, than the act making plaintiff's grant, for he makes no difference hardly in the provisions of these two acts, except as to the extent of the grant, while upon this point, as I have shown, they are very dissimilar. I think this is a proper case in which to apply the rule expressed by Chief Justice Marshall as to the authority of a decision in the case of Cohens *v.* Virginia, 6 Wheat., 399. In that case, speaking for the Supreme Court, he said:

"It is a maxim not to be disregarded that general expressions in every opinion are to be taken into connection with the case in which these opinions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for discussion."

See, also, Barney *v.* Railroad Co., 117 U. S., 228–231; 6 Sup. C't Rep., 654. I do not believe there was any demand for a construction of section 6 in plaintiff's grant in the case of Buttz *v.* Railroad Co., in connection with the filing of the map of the general route of its road, and hence the construction made it not binding in this case. In the case of Denny *v.* Dodson, *supra*, the plaintiff brought an action of ejectment, and in setting up his cause of action stated facts sufficient to show the grant of the land in dispute to the Northern Pacific Railroad Company, under whom he claimed; and then undertook to set forth facts to show that the land named in that case did not come within any of the limitations specified in plaintiff's grant, such as that the same — land to which the United States had full title not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of the road was definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office. While it may be doubted whether the plaintiff was required to allege and prove these facts, they being facts the principal purpose of which would be to negative any defense that might be presented to plaintiff's cause of action in that case, nevertheless, if required to be alleged, they should have been alleged directly, and not facts which by inference would show that this was true. It is an established maxim that material issuable facts as they exist should be alleged and not facts from which such facts may be inferred. Pom. Rem. & Rem. Rights, §§ 517, 532; Stringer *v.* Davis, 30 Cal., 318. But instead of averring the facts which showed that the land was not within any exception to plaintiff's grant directly, plaintiff alleges that at the time of the establishment of the general route on the 13th day of August, 1870, the land was public land not mineral, and not reserved, sold, granted, or occupied by homestead or other settlers, or otherwise disposed of or located upon, and was free from

pre-emption or other claims or rights. It seems to have been considered, if the lands were withdrawn from the market at that time, and this land was not then within any of the exceptions in plaintiff's grant, no such claim which could create such an exception could arise after that time; hence this was equivalent to an allegation that no claims creating such an exception could have existed at the time the line of the road was definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office. I submit that this result is reached only by an inference, or arises from an argument on the facts alleged; and this is not good pleading. But the eminent jurist thought this was equivalent to the other; and stated that, after the date of the establishment of the general route, it precluded any town site, pre-emption, or entry on such land, and said: "The law thus withdraws the land granted from sale and entry or pre-emption from the time the general route is fixed." To me this decision upon this point is unsatisfactory, and this court is not precluded by it. In looking at section 6 I find no authority for the assertion that any lands were to be withdrawn from market on the sides of the general route of the road of plaintiff when established. The section does not say so. It says the lands granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company. The establishing of the general route of the road could not determine what were the lands granted. These were determined by the fixed route of the road. The section does not say they shall be withdrawn at the time of the fixing of the general route of the road. If it should be so interpreted, then we have lands withdrawn from market which are not identified, and which may be many miles outside of the 40-mile limit on each side of the general route of the road, for the fixed route of the road may be a long distance from the general route thereof. Such facts have occurred in connection with plaintiff's road in Montana. The general route of plaintiff's road as located in 1872 extended down the Gallatin river up the Jefferson and Big Hole rivers, to a point south of the Deer Lodge pass in the Rocky mountains; thence through that pass and down the Deer Lodge river to its present route at Garrison. At points in this general route upon a north and south line it was near 100 miles south of the fixed route of plaintiff's road near Helena, Mont. There are several places in Montana where the fixed route and the general route of plaintiff's road materially differ. By the terms of plaintiff's grant in section 3 lands in odd sections within 40 miles north of the fixed route of plaintiff's road near said city of Helena are within it; they are part of the lands granted to the plaintiff, and it has asserted title to the same. Many of them were not within the 40-mile limit on each side of said general route. Yet, if the construction contended for of said section 6 is correct, these lands were withdrawn from market in 1872. Lands which have been sold by the United States upon odd sections were withdrawn because they were upon odd sections granted. It is admitted, and there can be no contention on the point in the light of judicial decisions but that the law withdrew the lands granted from the

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market, and they were not withdrawn by any order of the Secretary of the Interior. By his order lands near 150 miles south of the fixed line of plaintiff's road were sought to be withdrawn from market, although it cannot now be contended they were within the limits of plaintiff's grant, or granted to it by any construction of the law. It cannot, I think, be contended that part of the lands on the line of plaintiff's road which were granted to it were withdrawn from market by the provisions of section 6, and part not. In my judgment, if one section granted was withdrawn when the general route of the road was fixed, then all such lands were withdrawn. I think there is enough dispute about the construction of section 6 to drive us to the established rules for construing legislative grants in considering the same. Rights were given plaintiff in this section. In construing legislative grants they are to be construed against the grantee and in favor of the grantor. 3 Washb. Real Prop. (4th ed.), 190. "The rule of construction in all such cases in now fully established to be this: That any ambiguity in terms of the contract must operate against the adventurers and in favor of the public, and the plaintiff can claim nothing that is not clearly given in the act." Proprietors *v.* Wheely, 2 Barn & Adol., 793. This rule is fully approved by the Supreme Court in the case of Charles River Bridge *v.* Warren Bridge, 11 Pet., 420. In the case of Railroad Co. *v.* Litchfield, 23 How., 66, the Supreme Court said:

"All grants of this description are construed against the grantee. Nothing passes but what is conveyed in clear and explicit language; and, as the rights here claimed are derived entirely from the
43 act of Congress, the donation stands on the same footing as a grant by the public to a private company, the terms of which must be plainly expressed in the statute, and, if not thus expressed, they cannot be implied."

To the same effect are the cases of Rice *v.* Railroad Co., 1 Black, 360; Railroad Co. *v.* U. S., 92 U. S., 733. The reason of this rule is thus expressed in Gildart *v.* Gladstone, 11 East., 675.

"The reason of this rule is obvious. Parties seeking grants for private purposes usually draw the bills making them. If they do not make the language explicit and clear to pass everything that is intended to be passed, it is their own fault; while, on the other hand, such a construction has a tendency to prevent parties from inserting ambiguous language for the purpose of taking by ingenious interpretation and insinuation that which cannot be obtained by plain and express terms."

This language was quoted and approved by the Supreme Court in the case of Railroad Co. *v.* Litchfield, *supra*. If it is said this is a law, and we must be governed by the intention of the law-making power, the answer is that in construing such a law the intention should be formed from the terms used and the subject-matter under consideration, and it should be recognized that it makes a grant of land. In the case of Railroad Co. *v.* U. S., *supra*, the Supreme Court, in speaking of a land grant made in 1863 (the year before the plaintiff's grant) to the State of Kansas, said:

"Formerly lands which would probably be affected by a grant

were, as soon as it was made, if not in advance of it, withdrawn from market. But experience proved that this practice retarded settlement of the country, and at the date of this act the rule was not to withdraw them until the road should be actually located. In this way the ordinary working of the land system was not disturbed. Private entries, pre-emption, and homestead settlements, and reservations for special uses, continued within the supposed limits of the grant the same as if it had not been made; but they ceased when the routes of the roads were definitely fixed."

We learn from this the state of mind Congress was in upon this subject. The great body of the country on the proposed route of plaintiff's road at the time of the grant was Indian country, to which the Indian title of occupancy was not extinguished. But very few of the lands along this route had been surveyed.
44 Yet most of the country was accessible. It could hardly have been contemplated that it would be 18 years after the grant was made before the fixed route of that road would be established in Montana. It was very uncertain from the nature of the country what would be the fixed route of that road. The determination of this fixed route would give precision to the grant made plaintiff, and furnish a data for determining what lands had been granted. Can it be supposed that Congress intended, 10 years before the fixed route of plaintiff's road was established, to withdraw the lands granted to plaintiff from market, and leave it to subsequent explorations and surveys to determine what would be the lands granted? Upon such lands, during the time of these explorations and surveys, homes might be established and cities built. But it is said they were notified what these lands were by the establishing of the general route. As I have stated before, there are lands confessedly within plaintiff's grant which were not within the 40-miles limit on the line of the general route of plaintiff's road as established in 1872, and there are lands within it which were not granted to plaintiff. There might have been much more land of that character if some of the routes said to have been examined by that company had been finally adopted. As to what were the lands granted plaintiff, and when the grant attached to specific lands, we have a guide in the case of Railway Co. *v.* Dunmeyer, 113 U. S., 629; 5 Sup. C't Rep., 566, which interpreted the third section in the Union Pacific Railroad Company's grant, which is almost identical with the same section in plaintiff's grant. See 12 St. U. S., 492. In that case, speaking through the distinguished Justice Miller, the court said:

"The land granted by Congress was from its very character and surroundings uncertain in many respects until the thing was done which should remove that uncertainty and give precision to the grant. Wherever the road might go the grant was limited originally to five sections, and by the amendment of 1864 to ten sections, on each side of it within the limits of twenty miles. These were to be odd-numbered sections, so that the even-numbered did not pass by the grant; and these odd-numbered were to be those not sold, reserved, disposed of by the United States, and to which a pre-emption

or homestead right had not attached at the time the line of said
45 road is definitely fixed. When the line was fixed—which we have already said was by the act of filing this map of definite location in the General Land Office—then the criterion was established by which the lands to which the road had a right were to be determined. Topographically this determined which were the ten odd sections on each side of that line where the surveys had been made. This filing the map of definite location furnished also the means of determining what lands had previoualy to that moment been sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim had attached, for by examining the plat of this land in the office of the register and receiver or in the General Land Office it could readily have been seen if any of the odd sections within ten miles of the line had been sold or disposed of or reserved or a homestead or pre-emption claim had attached to any of them. In regard to all such sections they were not granted. The express and unequivocal language of the statute is that the odd sections not in this condition are granted. The grant is limited by its clear meaning to the other odd sections, and not these."

We have here a clear assertion that what lands are granted are only determined when the line of the road is definitely fixed. In quite a number of decisions by the Supreme Court it is said of such grants as the one under consideration they are in the nature of floats. When the route of the road is fixed which the law defines shall fix the grant then it takes precision, and attaches to certain specific lands. Schulenberg *v.* Harriman, 21 Wall., 60; Railroad Co. *v.* U. S., 92 U. S., 741; Railroad Co. *v.* Price Co., 133 U. S., 509, 10 Sup. C't Rep., 341. Can it be that Congress intended to say in the act granting lands to plaintiff that, although it will not be known until plaintiff designates a fixed line for its road and files its map thereof in the office of the Commissioner of the General Land Office, what specific lands are granted to it, yet these lands granted, as in this case, are to be withdrawn from market 10 years or more before it is known what they are and where situate? This construction would make the intention of Congress unreasonable, which should never be maintained until there is no escape. A reasonable attempt should always be presumed. The construction urged would make the statute about as unreasonable as one which doomed a man to capital punishment 10 years before he was born.

Taking into consideration all these facts, I do not think
46 section 6 should be so construed as to withdraw any land from market until the line of plaintiff's road should be definitely fixed opposite the same, and a plat thereof filed with the Commissioner of the General Land Office, when the situation of such lands would be known.

But let it be admitted that the land granted was withdrawn from market at the time of the filing of the plat of the general route of plaiutiff's road. Then the question arises what are the lands granted? The act does not say "every odd section within forty miles of such general route," but "public lands not sold, reserved,

or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the route is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office." This brings us back to the same point as the construction contended for. The land granted must at this time be free from a claim, or it is not land granted. Hence I hold that the premises in dispute were subject to be entered upon and a claim inaugurated at any time before the definite line of plaintiff's road was fixed and the plat thereof filed in the proper office.

The next question is as to whether the claim made upon these lands would avail if not a valid claim. The premises being agricultural, no valid claim of them for mining purposes could be made. The language for consideration here in the act making the grant to plaintiff is: "Shall be free from pre-emption or other claims or rights." What, in effect, the court is asked to do in construing this clause is to insert before "claims" the word "valid," so the clause would read "free from pre-emption or other valid claims or rights." Can the court do this? In the case of Newhall *v.* Sanger, 92 U. S., 761, the Supreme Court was called upon to construe a statute of the United States in which the words "lands claimed under any foreign grant or title" occurred. The position taken in that case was that the word "lawfully" should be placed before "claimed." But the court said there is no authority to import a word into a statute in order to change its meaning. In the case of Railroad Co. *v.* U. S., *supra*, the Supreme Court quoted with approval this language of Patterson, J., in Rex *v.* Burrell, 12 Adol. & E., 465:

47 "I see the necessity of not importing into statutes words which are not found there. Such a mode of interpretation only gives occasion to endless difficulty."

And then said:

"Courts have always treated the subject in the same way when asked to supply words in order to give a statute a particular meaning which it would not bear without them."

The word "valid" or "lawful," placed before "claims," would give the statute a different meaning from what it has without them. If they would not, plaintiff would not ask to have one or the other placed there. Here again the rule applies as to the construction of legislative grants. Nothing passes by such but what is conveyed in the act making the grant in clear and unambiguous terms. Such a grant must be construed most strongly against the grantee. Nothing is supplied by implication. There is another matter in this connection worthy of much consideration. If only lands which are free from valid or lawful claims at the date plaintiff fixed the definite line of its road are to be excluded from the grant, then the question is left open for consideration between plaintiff and any person who may have had a claim upon any odd section of land within its grant, the assertion of claim to which occurred since the act making the grant; for it can hardly be maintained that plaintiff would be bound by any determination as to the validity or lawfulness of a claim made by the Land Department which is junior to the grant to it. When the route of plaintiff's road was

definitely fixed its grant to the lands received by it would relate back to the date of the act making the grant, and take effect as of that date. This, in substance, is the language of many decisions in construing similar grants. Under these conditions plaintiff could inquire into every claim which had its inception subject to the date of its grant, whether patented or not, and have it determined as to whether it was valid or not. The point as to whether a homestead claim had attached to a parcel of land within the limits of the grant to the Kansas & Pacific Railway Company was considered by the supreme court in a case where that company was plaintiff and Dunmeyer was defendant, which was cited *supra*. In that case the court said:

48 "It is not conceivable that Congress intend- to place these parties as contestants for the land, with the right in each to require proof from the other of complete performance of its obligation. Least of all is it to be supposed that it was intended to raise up, in antagonism to all actual settlers on the soil when it had invited its occupation, this great corporation, with an intent to defeat their claims, and to come between them and the Government as to the performance of their obligations."

I do not see why this language is not as applicable to a party asserting a right to a mining claim as to one asserting a right to a homestead claim; and, if so, I might say it is inconceivable that Congress intended to give to plaintiff the right to test the validity of every mining claim which existed within 40 miles of the line of its road at the time the same was definitely fixed. Under such circumstances, public policy would dictate that the terms of limitation in plaintiff's grant should not be so modified as to permit such a condition of affairs. I think the facts presented show that the assertion of title by the parties who located the ground in dispute as mineral land should be dignified with the appellation of a "claim." I would not say that every assertion of title to land would be entitled to the term "claim." Perhaps acts sufficient should accompany the assertion of title to entitle the claimant to a standing in a court of justice to contest the right to possession of the premises; but I am not called upon in this case to determine more than that facts sufficient appear to show that the parties who had located this land in dispute as mineral had a claim thereon at the time the route of plaintiff's road was definitely fixed. The fact that it was determined, subsequent to the fixing of such route, that this claim was invalid would not restore the premises to plaintiff's grant. It was excluded therefrom. This was fully considered in the case of Railway Co. *v.* Dunmeyer, *supra*. For these reasons the demurrer to the answer is overruled.

Filed April 6th, 1891.

GEO. W. SPROULE, *Clerk.*

And thereafter, to wit, on the 7th day of April, A. D. 1891, the following further proceedings were had and entered of record in said cause in the words and figures following, to wit:

49 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

Second day, April term, A. D. 1891.

TUESDAY, *April 7th*, 1891—10 a. m.

Court convened pursuant to adjournment.
Present: Honorable Hiram Knowles, United States district judge.

NORTHERN PACIFIC R. R. Co.
vs.
J. G. SANDERS *et al.* } No. 62.

Counsel for plaintiff in this cause asked that plaintiff be granted time until April 25th, 1891, to file reply in this case or further plead herein. Whereupon it is so ordered.

And thereafter, to wit, on the 27th day of April, A. D. 1891, the following further proceedings were had and entered of record in said cause in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

Eighteenth day, April term, A. D. 1891.

MONDAY, *April 27th*, 1891—2 p. m.

Court convened pursuant to adjournment.
Present: Honorable Hiram Knowles, United States district judge for the district of Montana.

NORTHERN PACIFIC R. R. Co.
vs.
J. G. SANDERS *et al.* } No. 62.

Counsel for plaintiff here stated that he desired to file a motion for a rehearing, and asked for and was granted an extension of time, to wit, until April 28th, 1891, to file said motion.

And thereafter, on the 30th day of April, A. D. 1891, plaintiff filed its motion for a rehearing in said cause, which said motion is in the words and figures following, to wit:

In the Circuit Court for the District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
JUNIUS G. SANDERS *et al.*, Defendants.

Motion for Rehearing.

Now comes the plaintiff in the above-entitled cause and moves for a rehearing therein for the reasons:

50 I.

That at the hearing in the above-entitled cause, it was conceded by said defendants and their attorneys that under the act of Congress, approved July 2, 1864, the odd-numbered sections of public lands on and within forty miles of the general route of the Northern Pacific railroad were, by virtue of said act reserved from sale, pre-emption or entry; that relying upon said concession and believing said proposition to be unquestioned, plaintiff did not at such hearing discuss or argue this proposition save as such proposition was involved in an argument as to whether such reservation, assuming there was such, reserved said lands from mineral entry; and that consequently the decision made and rendered in said cause, holding and deciding that as a matter of law, said act of Congress did not create a reservation of such lands from sale, pre-emption or entry upon fixing the general route of said road was made and rendered without having heard full argument by counsel.

II.

That the decision of the court that the said act of Congress did not forbid the sale or entry *of* (or) location of odd-numbered sections of public land on and within forty miles of the general route of said Northern Pacific railroad, is contrary to the long-continued, uniform construction of said act by the Interior Department of the United States.

That such long-continued, uniform construction by the Interior Department of the United States of said act of Congress, approved July 2nd, 1864, was not called to the attention of the court, at the hearing in the above cause; and was not considered by the court in deciding said cause.

III.

That the decision of the court herein is in conflict with prior decisions of the circuit court for the ninth circuit, construing this same statue; that such prior decisions made by the circuit justice and circuit judge for the ninth judicial circuit, rendered after full argument by counsel, and mature and full consideration by
51 the court, are authoritative, and should be followed until reversed by the proper appellate court.

IV.

That the decision herein is in direct conflict with the decision of the United States Supreme Court in the case of Buttz *vs.* Northern Pacific Railroad Company, decided November 15th, 1886, and in the case of St. Paul & Pacific R. R. Co. *vs.* Northern Pacific Railroad Co., decided March 2nd, 1891, and since the argument and submission of this case.

That said decisions are authoritative, being rendered after full argument by counsel and mature deliberation and consideration by the court, and should be followed by this court.

V.

That the construction heretofore placed upon this act by the Interior Department of the United States, the Attorneys General, the supreme courts of States, the circuit courts and Supreme Court of the United States, in direct conflict with the decision herein, had been ratified and affirmed by Congress prior to the hearing herein; that by such ratification and affirmation such construction became and is a part of the law, and is final and conclusive.

That such ratification and affirmation were not called to the attention of the court at the hearing herein, and were not considered by the court in rendering such decision.

F. M. DUDLEY,
Attorney for Plaintiff.

Due service of the above motion is hereby acknowledged this 30th day of April, 1891.

ADKINSON & MILLER,
Of Counsel for Defendants.

(Endorsed:) No. 62. U. S. circuit court, district of Montana. Northern Pacific R. R. Co., pl'ff, *vs.* J. G. Sanders *et al.*, def'ts. Motion for rehearing. Filed April 30th, 1891. Geo. W. Sproule, clerk. F. M. Dudley, att'y for pl'ff.

And thereafter, to wit, on the 7th day of May, A. D. 1891, the following further proceedings were had and made of record in said cause in the words and figures following, to wit:

52 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

Twenty-seventh day, April term, A. D. 1891.

THURSDAY, *May 7th*, 1891—10 a. m.

Court convened pursuant to adjournment.

Present: Honorable Hiram Knowles, United States district judge for the district of Montana.

NORTHERN PACIFIC R. R. Co.
vs.
J. G. SANDERS *et al.* } No. 62.

Ordered that the motion for a rehearing in this cause be continued for the term.

And thereafter, on the 10th day of August, A. D. 1891, the following further proceedings were had and entered of record herein in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

63rd day, April term, A. D. 1891.

MONDAY, *August 10th*, 1891—10 a. m.

Court convened pursuant to adjournment.

Present: Honorable Hiram Knowles, United States district judge for the district of Montana.

NORTHERN PACIFIC RAILROAD CO.
vs.
J. G. SANDERS *et al.* } No. 62.

On motion of counsel for plaintiff, counsel for defendants consenting thereto, the motion of plaintiff for a rehearing herein is ordered set for hearing August 15th, 1891, at 2 o'clock p. m.

And thereafter, on the 15th day of August, A. D. 1891, the following further proceedings were had and entered of record in said cause in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

65th day, April term, A. D. 1891.

SATURDAY, *August 15th*, 1891—2 p. m.

Court convened pursuant to adjournment.

Present: Honorable Hiram Knowles, United States district judge for the district of Montana.

53 NORTHERN PACIFIC RAILROAD COMPANY
vs.
JUNIUS G. SANDERS *et al.* } No. 62.

This cause came on this day for hearing upon the motion of plaintiff herein for a rehearing upon the demurrer of plaintiff's to the answer of defendants, and after consideration it is ordered that said motion be and the same is hereby granted and allowed.

Whereupon the demurrer of plaintiff was argued by F. M. Dudley, Esq., of counsel for plaintiff, and by W. F. Sanders, Esq., of counsel for defendants, and thereupon said demurrer was submitted to the court for consideration and decision; and thereupon, after due consideration it is by the court ordered that said demurrer be and the same is hereby overruled.

And the plaintiff thereupon electing to abide by its said demurrer and declining to further amend or plead herein, on motion of counsel for defendants it is ordered that judgment be entered herein in favor of defendants for their costs, and judgment ordered entered in accordance therewith.

And thereafter on said day, to wit: August 15th, A. D. 1891, judgment for the defendants was entered in the words and figures following, viz:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

NORTHERN PACIFIC RAILROAD CO.
vs.
JUNIUS G. SANDERS *et al.*

In this case upon the application of the plaintiff for a rehearing upon its demurrer to the answer of the defendants to plaintiff's amended complaint, the same was this 15th day of August, 1891, granted, and such rehearing was had and the said case was argued by counsel.

On consideration whereof the demurrer of the plaintiff to defendants' said answer to its amended complaint was overruled, and the said plaintiff electing to abide by its said demurrer on the day last named, the same cause came on to be heard upon the
54 amended complaint of the plaintiff, The Northern Pacific Railroad Company, and the answer of the defendants thereto, in consideration whereof it is considered by the court that the defendant Junius G. Sanders, Wilbur E. Sanders, James U. Sanders and Sarepta M. Sanders do have and recover their costs in this behalf expended taxed at $3.10 and that they go hence without day.

Filed and entered August 15th, 1891.

GEO. W. SPROULE, *Clerk.*

And thereafter on said 15th day of August, 1891, the following further proceedings were had and entered of record in said cause in the words and figures following, viz:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

65th day, April term, A. D. 1891.

SATURDAY, *August 15th*, 1891—p. m.

Court convened pursuant to adjournment.

Present: Honorable Hiram Knowles, United States district judge, for the district of Montana.

NORTHERN PACIFIC RAILROAD COMPANY
vs.
JUNIUS G. SANDERS *et al.*
No. 62.

On motion of counsel for plaintiff, the bond on writ of error herein, is ordered fixed in the amount of $500.00.

And thereafter said plaintiff filed its assignment of errors herein, which said assignment of errors is in the words and figures following, to wit:

In the United States Circuit Court for the Ninth Circuit, District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
JUNIUS G. SANDERS, WILBUR E. SANDERS, JAMES U. SANDERS, and SEREPTA M. SANDERS, Defendants.

Assignment of Errors.

Now comes the said Northern Pacific Railroad Company, by its attorney, and says that in the records and proceedings in the above-entitled action, in the said United States circuit court for the
55 ninth circuit, district of Montana, there is manifest error, as follows, to wit:

I.

The said court held that the odd-numbered sections of non-mineral, public land, to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and which were free from pre-emption or other claims or rights when the general route of the Northern Pacific railroad was fixed, and which were on and within forty miles of the line of such general route, were not, whether surveyed or unsurveyed, by the fixing of such general route, withdrawn from sale, pre-emption or entry, except by said railroad company.

II.

The said court held that section twenty-one (21) township ten (10) north, of range three (3) west, P. M. Montana, was, after said Northern Pacific Railroad Company fixed the general route of its road opposite thereto and within forty miles thereof, to wit: February 21st, 1872, subject to sale, pre-emption and entry by parties other than said Northern Pacific Railroad Company.

III.

The said court held that the mineral locations, claim, and applications for patent for the northeast quarter (N. E. ¼) of section twenty-one (21) township ten (10) north, of range three (3) west, P. M. Montana, by Theodore H. Kleinschmidt, Edward W. Knight, Henry M. Parchen, Charles K. Wells, George P. Reeves, David H. Cuthbert, Cornelius Hedges and Stephen E. Atkinson, for the northwest quarter (N. W. ¼) of said section by George P. Reeves, Helen H. Reeves, Laura C. Ballow, John W. Eddy, Evelyn M. Eddy, Edward W. Knight, Theodoria M. Knight and Anna Naoolia King, for the southwest quarter (S. W. ¼) of said section by Theodore H. Kleinschmidt, Henry M. Parchen, David H. Cuthbert, Stephen A. Atkinson, Lucius C. Rosecrans, Emma M. Parchen, Mary M. Kleinschmidt, and Anna E. Cuthbert, for the southeast quarter (S. E. ¼) of said section by Cornelius Hedges, Thomas A. H. Hay, Mary L. Guthrie, Patrick Quinn, Louis A. Walker, William D. Wheeler,
56 Edna L. Hedges, George E. Carpenter, Russell B. Harrison,

as set forth in the answer to the amended complaint herein, and the pendency of the contest, or contests, before the United States district land office, between said parties, and the said Northern Pacific Railroad Company, as to the quality of the soil of said section, at the time the line of the said Northern Pacific railroad opposite to and within forty miles of said section twenty-one (21) was definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office, to wit: July 6th, 1882, excluded said lands from the description of public lands to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, and operated to exclude said land from the grant to said Northern Pacific Railroad Company by the act of Congress approved July 2nd, 1864.

IV.

The said court held that the mineral locations, claims and applications for patent for the northeast quarter (N. E. ¼) of said section twenty-one (21) township ten (10) north of range three (3) west, P. M. Montana, by Theodore Kleinschmidt, Edward W. Knight, Henry M. Parchen, Charles K. Wells, George P. Reeves, David H. Cuthbert, Cornelius Hedges and Stephen E. Atkinson, for the northwest quarter (N. W. ¼) of said section by George P. Reeves, Helen H. Reeves, Laura C. Ballow, John W. Eddy, Evelyn W. Eddy, Edward W. Knight, Theodosia M. Knight and Anna Natolia King; for the southwest quarter (S. W. ¼) of the said section by Theodore H. Kleinschmidt, Henry M. Parchen, David H. Cuthbert, Stephen Atkinson, Lucius J. Rosecrans, Emma M. Parchen, Mary M. Kleinschmidt and Anna E. Cuthbert; for the southeast quarter (S. E. ¼) of said section by Cornelius Hedges, Thomas A. H. Hay, Mary L. Guthrie, Patrick Quinn, Louis A. Walker, William D. Wheeler, Edna L. Hedges, George E. Carpenter, Russell B. Harrison, as set forth in the answer to the amended complaint herein, were not null and void, and of no effect whatever.

V.

The said court held that section twenty-one (21) town-
57 ship ten (10) north, of range three (3) west, P. M. Montana, although non-mineral in character, was subject to a mineral location, claim or entry.

VI.

The said court held that the mineral location, claim, and application for patent for said section twenty-one (21), township ten (10) north, of range three (3) west, P. M., as set forth in the answer to the amended complaint herein, operated to reserve, grant or appropriate said land or cause the same to cease to be free from pre-emption, or other claims or rights so as to exclude the same from the grant to the Northern Pacific Railroad Company.

VII.

The said court failed and declined to hold that said Northern Pacific Railroad Company was the owner of and entitled to the possession of said section twenty-one (21), township ten (10) north, of range three (3) west, P. M., Montana.

VIII.

The said court held that said answer to the amended complaint in the above-entitled action states facts sufficient to constitute a defence or counter-claim.

Wherefore, said Northern Pacific Railroad Company prays that the said judgment of the said United States circuit court for the district of Montana be reversed, and that said court be ordered to enter an order reversing the judgment herein, and sustaining said demurrer.

FRED. M. DUDLEY,
Attorney for Northern Pacific Railroad Company.

(Endorsed:) No. 62. In the circuit court of the United States, ninth circuit, district of Montana. Northern Pacific Railroad Co., pl'ff, *vs.* J. G. Sanders *et al.*, def'ts. Assignment of errors. Filed August 17th, 1891. Geo. W. Sproule, clerk.

And thereupon and at the same time, to wit: August 17th, 1891, plaintiff filed its petition for a writ of error herein; which said petition for a writ of error is in the words and figures following, to wit:

58 In the United States Circuit Court for the Ninth Circuit, District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
JUNIUS G. SANDERS, WILBUR E. SANDERS, JAMES U. SANDERS, and SEREPTA M. SANDERS, Defendants.

Petition for Writ of Error.

To the honorable judges of the United States circuit court of appeals for the ninth circuit:

Now comes the said Northern Pacific Railroad Company, by Fred. M. Dudley, its attorney, and complains that in the record and proceedings, and also in the rendition of judgment in the above-entitled cause, in said United States circuit court for the ninth circuit, district of Montana, at the April term thereof, A. D. 1891, against said Northern Pacific Railroad Company, on the fifteenth day of August, A. D. 1891, manifest error hath intervened to the great damage of said Northern Pacific Railroad Company; wherefore the said Northern Pacific Railroad Company prays for the allowance of a writ of error and such other process as may cause

the same to be corrected by the said United States circuit court of appeals for the ninth circuit.

FRED. M. DUDLEY,
Attorney for Northern Pacific Railroad Company.

Allowed. HIRAM KNOWLES,
U. S. Dist. Judge.

(Endorsed:) No. 62. In the circuit court of the United States, ninth circuit, district of Montana. Northern Pacific Railroad Co., pl'ff, *vs.* J. G. Sanders *et al.*, def'ts. Petition for writ of error. Filed Aug. 17th, 1891. Geo. W. Sproule, clerk.

And thereafter and on the 19th day of August, A. D. 1891, plaintiff filed its bond on writ of error duly approved, which said bond is in the words and figures following, to wit:

59 In the United States Circuit Court for the Ninth Circuit, District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
JUNIUS G. SANDERS, WILBUR E. SANDERS, JAMES U. SANDERS, and SEREPTA M. SANDERS, Defendants.

Know all men by these presents, that we Northern Pacific Railroad Company, by Fred. M. Dudley, its attorney, and E. W. Knight, T. H. Kleinschmidt, of the city of Helena, State of Montana, are held and firmly bound unto Junius G. Sanders, Wilbur E. Sanders, James U. Sanders and Serepta M. Sanders, the above-named defendants, in the sum of five hundred dollars, to be paid to the said defendants, their executors or administrators; for the payment of which well and truly to be made, we bind ourselves, and each of us jointly and severally, and our heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated this 18th day of August, A. D. 1891.

Whereas, the above-named Northern Pacific Railroad Company has prosecuted a writ of error in the United States circuit court of appeals for the ninth circuit, to reverse the judgment rendered in the above-entitled action by the United States circuit court for the ninth circuit, district of Montana, at the April term of said court, A. D. 1891,

Now therefore, the condition of this obligation is such, that if the above-named Northern Pacific Railroad Company shall prosecute its said writ of error to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

NORTHERN PACIFIC RAILROAD COMPANY.
By FRED. M. DUDLEY. [SEAL.]
E. W. KNIGHT. [SEAL.]
T. H. KLEINSCHMIDT. [SEAL.]

Signed and sealed in the presence of—
GEO. H. HILL.

I approve the above bond and the sufficiency of the sureties thereto.

HIRAM KNOWLES,
U. S. Dist. Judge.

60 (Endorsed:) No. 62. In the circuit court of the United States, ninth circuit, district of Montana. N. P. R. R. Co. *vs.* J. G. Sanders *et al.* Bond filed Aug. 19, 1891. George W. Sproule, clerk.

And thereafter to wit: on the 8th day of September, A. D. 1891, (the court having stated on the 15th day of August, A. D. 1891, that it desired to file another opinion in said cause and the attorneys for both parties consenting that said opinion might be filed thereafter,) the following opinion was filed in said cause overruling said demurrer upon a rehearing thereof, which said opinion is in the words and figures following, to wit:

Opinion.

In the United States Circuit Court, District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
J. G. SANDERS *et al.*, Defendants.

KNOWLES, *J.:*

The motion for a rehearing in this case by consent was granted, and upon the point as to whether the alternate odd sections of land non-mineral to which the Government of the United States had full title, not reserved, sold, granted or otherwise appropriated and free from pre-emption or other claims or rights at the time the general route of plaintiff's road was fixed to the width of forty miles on each side of the said general route in Montana, by virtue of section six of the act in which is found the grant of land to plaintiff, was reserved from sale, entry or pre-emption was reargued.

I have determined to adhere to my former ruling, and to hold that said section six should not be construed to have this effect although it must be confessed that the able counsel for plaintiff presented many new and persuasive authorities upon this point.

He urges that the point was presented in the brief of counsel to the Supreme Court for its consideration in Buttz *v.* The Northern Pacific R. R. Co., 119 U. S. 55. In the statement of the case and of the points presented on the part of the appellant Buttz, in the official report of this case no such point is presented. The court in that case found without reservation that the agreement be-
61 tween the Indian tribes who held the right of occupancy to the land in dispute, which agreement extinguished this right of occupancy was not in force until approved by the Secretary of the Interior.

It says on page 69 of opinion:

"This modified agreement must be considered as accepted on the

part of the United States when it was approved by the Secretary of the Interior." This was on the 19th of June, 1873.

The map of the definite location of plaintiff's road was filed with the Commissioner of the General Land Office on the 26th day of May, of the same year.

The court having fully shown that the right of pre-emption could not attach to Government land until after the Indian title of occupancy had been extinguished, and that notwithstanding the Indian title of occupancy, the grant to plaintiff attached to the land in dispute as soon as the definite route of plaintiff's road was fixed and a map thereof filed in the office of the Commissioner of the General Land Office, there was no ground upon which appellant Buttz could rest. The court did not find as a fact that the agreement to cede the Indian title of occupancy took effect at the time the Indians consented to the proposed agreement. The judgment of a court is *res adjudicata* when based upon facts found. Certainly the construction of sections six of said act and the effect of fixing the general route of plaintiff's road was not required for a determination of the case.

The Supreme Court in Barney *vs* Winona, &c., R. R. Co., 117 U. S., 228, said of the decision of an important point when it was previously before it:

"The statement was not at all material to the decision which was that a deduction should have been made by reason of the intersection of two grants so far as the prior grant was located within the extension. We recognize the rule that what was decided in a case pending before us on appeal is not open to reconsideration in the same case in the second appeal upon similar facts. The first decision is the law of the case, and must control its disposition, but the rule does not apply to expressions of opinion or matters, the disposition of which was not required for the decision."

62 Here was an opinion in the same case and undoubtedly the court of original jurisdiction felt bound by it, but the court in substance held, that it was error to follow it in that particular, wherein the Supreme Court expressed an opinion upon a point not required for the decision. If the court had found that the agreement for the relinquishment of the Indian title mentioned in the case of Buttz *vs.* The Northern Pacific R. R. Co., went into effect when the Indians consented to the modified agreement then there would have been a necessity for deciding the point at issue.

To suppose a fact to exist which a court has held was not a fact with the view of expressing a legal opinion upon it does not seem to me to be required for the decision of a case.

In the case of St. Paul & Pacific R. R. Co. *vs.* The Northern Pacific R. R. Co., 139 U. S., 1, claimed by plaintiff to support the case of Buttz *vs.* The Northern Pacific R. R. Co., *supra*, the Supreme Court on page 17 of the opinion said in speaking of the grant to plaintiff:

"The new rights were to vest with the release of the old rights. The transfer was to be mutual and simultaneous. There was therefore no operative grant until there was an effective release and

whichever date be taken, whether December 13 or 19, it was subsequent to the definite location of the Northern Pacific Railroad Company in Minnesota. A map of that location approved by the Secretary of the Interior, was filed as stated above in the office of the Commissioner of the General Land Office on the 21st of the previous November. No grant was in existence of any lands to any other company which are claimed by the plaintiff in this suit at the time of the definite location of its route."

Again: "But independently of this conclusion we are of opinion that the exception in the act making the grant to the Northern Pacific Railroad Company was not intended to cover other grants for the construction of roads of a similar character, for this would be to embody a provision which would often be repugnant to and defeat the grant itself."

It would seem that the above rulings were sufficient to have disposed of that case, and that there was no occasion for deciding the point at issue in this case upon the construction of said section six.

63 But in addition thereto the court said: "The Northern Pacific act directed that the President should cause the lands to be surveyed forty miles in width on both sides of the entire line of the road after the general route should be fixed, and provided that the odd sections granted should not be liable to sale, entry or pre-emption, before or after they were surveyed, except by the company. They were therefore excepted by that legislation from grants independently of the withdrawal by the Secretary of the Interior. His action informally announcing their withdraw-l was only giving publicity to what the law itself declared."

Now, it should be observed that the court was considering in this case two acts of Congress, making grants to two different railroad companies, to aid them in constructing their road.

The language in said section six is: "And the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after such survey, except by said company."

The term grant does not occur among these terms. The terms are, sale, entry and pre-emption. The Supreme Court, in speaking of these terms in the case of Kansas Pacific R'y Co. *vs.* Dunmeyer, 113 U. S., 629, said: "In the terminology of the law concerning the disposition of the public lands of the United States each of these words has a distinct and well-known meaning in regard to the mode of acquiring rights to these lands. This is plainly to be seen in the statutes we are construing. In the third section or granting clause there are excepted from the grant all lands which at the time the definite location of the road is fixed had been sold, reserved, or otherwise disposed of and to which a pre-emption or homestead claim had attached. Here sale, pre-emption and homestead claims are mentioned as three different modes of acquiring an interest in the public lands which is to be respected when the road became located, and the words are clearly used because they were thought to be necessary. But a sale for money in hand by an entry made by the party buying is throughout the whole body of laws for disposing of the public lands understood to mean a different thing

from the establishment of a pre-emption or homestead right, where the party sets up a claim to a definite piece of land, and is
64 bound to build on it, make fences, cultivate and reside on it, for a period of time prescribed by law."

Let us consider these terms sale, entry, and pre-emption.

Sale is a transmutation of property, or a right from one man to another in consideration of a sum of money as opposed to barter, exchange and gifts.

Rapalje and Lawrence Law Dictionary.

Benjamin on Sales, in considering the term sale, says of the element of price § 2. It must be money paid or promised accordingly as the agreement may be for a cash or a credit sale. But if any other consideration than money be given it is not a sale.

See also Chitty on Contracts, 373; Story on Contracts, § 778. Tiedeman on Sales, § 12.

This point has been considered by the Supreme Court, in the case of Williamson *vs.* Berry, 8 How., 495.

In it the court said:

"Upon the first of them relating to the premises having been parted with by Clark to De Grasse, upon a consideration other than cash, we remark that sale is a word of precise legal import both at law and in equity. It means at all times a contract between two parties to give and to pass rights of property for money which the buyer pays or promises to pay to the seller for the thing bought and sold."

In the Five Per Cent cases, 110 U. S., 471, the Supreme Court made a distinction between public lands disposed of in satisfaction of military land warrants, and those sold for money, and said: "A sale in the ordinary sense of the word is a transfer of property for a fixed price in money or its equivalent."

If we turn to the statutes of the United States, we find special provisions for the sale of public lands.

See Revised Stat. of U. S. from sec. 2353 to sec. 2379.

There are also provisions for the sale of mineral lands. But nowhere is there any definition of the term sale which would make it include a grant of land to a railroad company in aid of the construction of its road whether we consider the term as used at common law or in the statute.

The Supreme Court in the case of Chotard *vs.* Pope, 12
65 Wheaton, 586, defined the term entry as used in the statutes of the United States, and upon this point said:

"The term entry as applied to appropriations of lands was probably borrowed from the State of Virginia, in which we find it used in that sense at a very remote period. Many cases will be found in the reports of the decisions of this court in which the title to western lands were drawn in question which will show how familiarly and generally the term is used by courts and bar. Its sense in the legal nomenclature of this country is now as fixed and definite as that of many terms borrowed from the common law.

It means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country by filing his claim in the office of an officer known in the legislation of several States by the epithet of an entry-taker, and corresponds very much in his functions with the register of land offices under the acts of the United States.

In the natural progress of language the term has been introduced into the laws of the United States; and by reference to those laws we think the meaning of the term will be found to be distinctly confined to the appropriation of lands under the laws of the United States at private sale."

With this definition of this term it would be difficult to maintain that a grant to a railroad company in aid of the construction of its road could be embraced in the term entry.

The term pre-emption is well understood, and is sufficiently defined in the provisions of the Revised Statutes of the United States, from section 2257 to 2288. It certainly does not cover a grant to a railroad company such as we are considering. It is hardly to be presumed that the Supreme Court intended in the case under consideration to give a new definition to terms which have long been in use in the statutes of the United States and to reverse decisions of its own which have defined these terms. The term not being included in the terms sale, entry or pre-emption, any construction of the same when the court was considering only the term grant as applied to the aid in land given to a railroad company could not have been essential to the decision of the case at issue and hence not controlling authority binding upon other courts. With the highest respect for the Supreme Court and with a strong disposition to follow where its beacon of legal light indicates, I cannot but feel that it has not fully considered the point under discussion and that the construction of the clause in section six "And the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before they are surveyed by said company," indicated by it is not in accordance with the rules frequently expressed by it for the construction of legislative grants of the character made to plaintiff. The point I suggested in the former opinion in considering the case of Buttz *v.* The Northern Pacific R. R. Co., *supra*, that the Supreme Court intimated that the law required of the plaintiff the filing of a map of its general route when there was no such provision of the statute in the act making the grant to plaintiff was discussed at some length upon the rehearing in this case. And it was urged that the filing of this map was one of the acts performed by plaintiff in fixing its route, and that the terms fixing a route implied the filing of such a map with the Secretary of the Interior. But the case of Buttz *vs.* The Northern Pacific R. R. Co., *supra*, does not so say. It says: "The general route may be considered as fixed when its general course and direction are determined after an actual examination of the country or from knowledge of it and is designated by a line on a map showing the general features of the adjacent country and the places through or by which it shall pass."

66

In this there is nothing said about the filing the map with the

Secretary of the Interior, as in an act required in fixing the general route of plaintiff's road.

But subsequently the court says: "When the general route of the road is thus fixed in good faith and information thereof given to the Land Department by filing the map thereof with the Commissioner of the General Land Office or Secretary of the Interior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side."

Here there is a plain distinction made between fixing the general route and the filing of a map with either of said officers. And the object of filing this map is stated, namely, the giving of the information that the general route has been fixed.

67 Without doubt information should have been given to the president of the fixing of the general route of plaintiff's road before he could be required to cause the land to be surveyed on both sides of the same. But I deny that there is any warrant for the claim that the law required that this map of the general route of plaintiff's road should be filed with the Commissioner of the General Land Office, or the Secretary of the Interior, and that then the law stepped in and withdrew from sale, entry, or pre-emption the odd sections of land within forty miles of the line of this general route upon the happening of this event. One of the established rules for the construction of a statute is by the statute itself.

In the 3rd section of the act in which is found the grant to plaintiff there is made a clear distinction between the fixing of the definite route of plaintiff's road and the filing of a plat thereof with the Commissioner of the General Land Office. When the definite route is fixed and a plat thereof filed in the office of the Commissioner of the General Land Office the grant to plaintiff receives precision, and attaches to the odd sections granted as of the date of the grant. Can it be that there is one mode of fixing the definite route of plaintiff's road, and another in fixing of its general route? Can it be that in fixing the definite route of plaintiff's road a map was required to be filed with the Secretary of the Interior or the Commissioner of the General Land Office, and then another map or plat of this fixed route with a view of establishing and giving precision to the grant to plaintiff?

But whatever be required in fixing the general route of plaintiff's road the statute does not give the effect to the act of filing a map of this route claimed for it. It would have no more force than as one of the acts fixing this route.

But it is urged that the Land Department of the Government has given a construction to section six and that this is binding. The Supreme Court in the case of United States *vs.* Pugh, 99 U. S., 265, said upon this point: "The rule which gives determining weight to contemporaneous construction put upon a statute by those charged with its execution applies only in cases of ambiguity and doubt." Citing: Edwards, lessee, *vs.* Darby, 12 Wheaton, 206; Smythe *vs.* Fiske, 23 Wall. 374, U. S. *vs.* Moore, 95 U. S., 760.

68 And in the case of The United States *vs.* Graham, 110 U. S. 219, the Supreme Court says: "Such being the case it mat-

ters not what the practice of the departments may have been or how long continued for it can only be resorted to in aid of interpretation, and it is not allowed to interpret what has no need of interpretation. If there were ambiguity or doubt, then such a practice begun so early and continued so long would be in the highest degree persuasive if not absolutely controlling in its effect. But with language clear and precise, and with its meaning evident, there is no room for construction, and consequently no need of anything to give it aid."

The language in the 6th section in the act making the land grant to plaintiff, for consideration is, "And the odd sections of land hereby granted shall not be liable to sale, or entry or pre-emption before or after they are surveyed, except by said company as provided in this act."

The point about which discussion has centered in this case, is what is meant by the words "odd sections of land hereby granted" turning to section 3rd, of said act, we find what are the odd sections of land granted to plaintiff.

It provides "There be and hereby is granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, to the Pacific coast and to secure the safe and speedy transportation of the mails, troops, munitions of wars and public stores over the route of the line of said railway every alternate section of public land, not mineral, designated by odd numbers to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office."

Does not this define what are the odd sections of land
69 granted? And what better means of determining the meaning of words in an act than the act itself, when it defines the meaning thereof? The Supreme Court in the case of Neal *vs.* Scruggs, 95 U. S. 704, said in speaking of a clause in an act: "A passage will be best interpreted by reference to that which precedes and follows it."

In the case of Kohlstadt *vs.* Murphy, 96 U. S. 153, the Supreme Court again said:

"In the exposition of a statute the established rule is, that the intention of the law-maker is to be deduced from a view of the whole statute, and every material part of the same."

In Endlich on the Interpretation of Statutes will be found the same rules expressed for the interpretation of statutes.

There was something said in the argument in this case about the use of the term odd sections, and it was urged that all that was necessary for Congress to have said was "the lands hereby granted"

if it desired to specify in section six the lands described in section three. The most that can be said in regard to the use of these words is, that they make the section unnecessarily particular in the description of the land to be affected. I have yet to learn, however, that unnecessary particularity of description of premises in a statute or deed, made either ambiguous. It should be at all times observed that the terms "odd sections of land hereby granted" were used only in the attempt to describe the lands which were reserved from sale, entry, or pre-emption. That there seems to have been considerable dispute about the meaning of this section seems true. But a dispute about the construction of a statute does not always make an ambiguity, and not always a legal doubt as to its meaning. But when there is presented an ambiguity or legal doubt in considering the meaning of a statute those called upon to construe are not empowered to discard all rules established by the jurisprudence which is our birthright, and proceed to establish a new and a different statute and one not warranted by the language used. In this case there is a construction contended for which has the effect to obliterate from the statute the words "land hereby granted" and to substitute therefor "non-mineral land within forty miles of each side of the general route of plaintiff's road as it may adopt through the territories of the United States, and ten alternate sections of land per mile on each side of said general route whenever it passes through any State, and whenever on the line thereof the United States have a full title not reserved, sold, granted or otherwise appropriated and free from pre-emption or other claims or rights at the time the general route of said road was fixed."

I sought to show in the former opinion I wrote in this case that to make that clause in that section read in that way would result in reserving from sale, entry and pre-emption odd sections of land not granted, and leaving without said reservations odd sections of land which were granted in said section three as there was no provision that the fixed route of the road should be the same even substantially as the general route thereof, and that as a matter of fact in many places it was not.

I furthermore sought to show that as the grant to plaintiff was in the nature of a float until the definite route of the road was fixed and a plat thereof filed in the office of the Commissioner of the General Land Office "the odd sections of land granted" to plaintiff could not be reserved from sale, entry or pre-emption because until then they were not identified; for how could lands be reserved from sale, entry or pre-emption until known and capable of description.

I might have added that the construction of section six claimed by plaintiff left without force some of the exception to the grant in section three, as far as were concerned the lands within the limits of the general route which correspond with those within the limits of the fixed route because in effect under that construction they received their status when the general route was fixed. Non-mineral public lands not then sold and which were free from pre-emption or

other claims or rights could not afterward be sold or made subject to any entry or pre-emption claim or right. The effect of this would be that the grant to plaintiff would as a matter of fact attach to all such lands as were within the limits of its grant as were not sold or subject to sale, entry or pre-emption right at the time the general route of plaintiff's road became fixed. And in construing this part of section three which reads as follows: "And whenever prior to said time any of said sections or parts of sections
71 shall have been granted, sold, reserved, occupied by homestead settlers or pre-empted or otherwise disposed of, other lands shall *shall* be selected by said company in lieu thereof under the directions of the Secretary of the Interior in alternate sections, and designated by odd numbers not more than ten miles beyond the limits of said alternate sections." The words "lawfully," must be inserted before at least each one of the words "sold," "occupied by homestead settlers and pre-empted," for the said time mentioned in said clause refers to the time when the route of the road should be definitely fixed and the plat thereof filed with the Commissioner of the General Land Office. Surely the language of Patterson, J., in Rex *v.* Burrell 12 Ald. & E. 465 cited in the previous opinion, recurs with consider*ed* force when considering this question.

"I see the necessity of not importing into statutes, words which are not found there. Such a mode of interpretation only gives occasion to endless difficulty."

It was brought to the attention of the court that in an opinion given by ex-Assistant Attorney General Smith upon the construction of said section sixth, he had held that some force should be given to the cause therein under discussion. That after the fixed route of the road was made and the plat thereof duly filed, the law conveyed the odd sections named in section three and this would leave that clause no function to perform if it applied to the lands described in said section. If this were so it would not authorize that able officer to construct a new statute and to disregard the established rules for constructing such a statute as this, and to ignore the meaning of words well known and which were defined in the act itself. There is nothing unusual in finding in a statute words which might have been omitted.

Plaintiff was not to have a patent for the lands granted until each twenty-five miles of the road it might construct should be accepted or determined to be in accordance with the provisions of the act making the grant. When the land grant to plaintiff received precision by the establishing of the fixed route of its road, Congress said then it shall not be subject to the general laws provided for the disposal of public lands such as sale, entry or pre-emp-
72 tion. This would prevent any cloud being placed upon the lands granted by the officers of the land department. I am led to this conclusion by what follows in that section. Evidently Congress had its mind directed to the general laws for the disposal of public lands when considering that section. Commencing at the clause under discussion and the section reads "And the odd sections of land hereby granted shall not be liable to sale or entry or pre-

emption before or after they are surveyed except by said company as provided by this act;" but the provisions of an act of September, eighteen hundred and forty-one granting pre-emption rights and all acts amendatory thereof and of the act entitled "An act to secure homesteads to actual settlers on the public domain approved May 20, eighteen hundred and sixty-two," "shall be, and the same are hereby extended to all other lands on the line of said road when surveyed excepting those granted to said company."

We have here the words "line of said road" not the line of the general route of said road.

If ex-Assistant Attorney General Smith had found upon examination that without this last-named clause in that section, the general laws granting pre-emption rights and homestead rights, applied to most of the lands not granted to plaintiff on the line of its road as soon as surveyed, I do not know what course he would have taken in his endeavor to find some function for that part of that section to perform and what new meaning he would found in the language thereof. The truth is that two statutes are often found covering the same ground. It is said that the object of the clause under consideration was to preserve the land after the location of the general route for the benefit of plaintiff, so that its grant might attach thereto. I know of no means of determining what the object of a statute is other than by a reference to the language used; and I do not find this object manifested in that clause. As I have shown, I think sale, entry, and pre-emption are terms which apply to only particular modes of disposing of the public domain. But in the limitations upon plaintiff's grant we have the terms "granted, reserved and otherwise appropriated."

It is singular if Congress intended to preserve these lands
73 from the time of the fixing of the general route of plaintiff's road, that that body should have provided for preserving only from the disposal to those who would have to settle upon the same, make homes and develop the country, and left them open to other modes of disposal.

It was claimed that Congress had approved of the decisions of the Supreme Court which had construed plaintiff's grant by the use of this language in an act approved 3d (March) 1887, 24 Stats. 556.

"That the Secretary of the Interior, be, and is hereby authorized to immediately adjust in accordance with the decisions of the Supreme Court each of the railroad land grants made by Congress to aid in the construction of railroads, and heretofore unadjusted."

It would seem that if Congress meant that all land grants made to aid in the construction of railroads should be made to conform to the decisions of the Supreme Court as to their extent, it should have so declared directly itself, and not have passed a statute authorizing the Secretary of the Interior to so declare. It would seem, in my judgment that there were some disputes about these grants, and Congress authorized the Secretary of the Interior to settle them, and in so doing to be guided by the decisions of the Supreme Court bearing upon the subject in dispute. What those disputes were does not appear in the statute. The power to settle a dispute, and to make a land

grant conform to a decision of a court, I apprehend are not the same, but different things.

And with the view I have of the statute it will not bear the construction contended for by plaintiff. Finally, plaintiff urges, that when one circuit court of the United States decides a point, that all the others should conform their views to this decision, until the matter is settled by the rulings of the Supreme Court. But this is not the rule which prevails in the circuit courts of the United States. The very decision, that counsel for plaintiff would have me consider as binding—Denny *v.* Dodson, 13 Sawyer, 68 is an illustration showing that the rule contended for does not prevail. The very distinguished judge who delivered that opinion refused to be governed by a former decision of the very same court rendered by the experienced and able Judge Deady upon a material point in regard to the nature of plaintiff's title to the land granted it. A United
74 States circuit court undoubtedly always, with reluctance will assert its right to disagree with the decision of another circuit court, even when satisfied that it is erroneous. I am aware that in refusing to concur with the opinions of many able jurists expressed upon the construction of said section six, I, justly, perhaps, subject myself to the charge of presumption; I trust not, however, to the charge of having arrayed myself with the growing army of cranks who find so congenial a home in our republican society, for I have no desire to be other than conservative, and to adhere to the well-established rules for construing a statute of the class under consideration.

In not one of the decisions referred to as supporting the views of plaintiff is there any discussions of the terms under consideration used in said section six, and they shown to have the force claimed. In none of them a reference to the established rules for construing such statutes. In the Bible there is the command "Thou shalt not follow a multitude to do evil." Perhaps, it is well to have some one ask of the route we are following in the construction of statutes making legislative grants of the public domain to the end that we may learn whether or not in such matters the old landmarks are to be discarded and new ones observed.

For the above reasons, I ordered; that the previous judgment of this court should stand and remain in force.

Filed Sept. 8th, 1891.

GEO. W. SPROULE, *Clerk.*

UNITED STATES OF AMERICA, *District of Montana,* } *ss:*

Circuit Court of the United States, Ninth Circuit, District of Montana.

I, George W. Sproule, clerk of said circuit court, do hereby certify and return to the honorable the United States circuit court of appeals for the ninth circuit, that the foregoing volume consisting of 90 pages numbered consecutively from 1 to 90, inclusive, is a true and complete transcript of the records, process, pleadings, or-

ders, judgment and other proceedings in said cause and of
75 the whole thereof as appears from the original records and files of said court; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation, writ of error and opinions rendered in said cause and also proof of service of said citation and writ of error.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Helena, in the district of Montana, this 8th day of September, in the year of our Lord, one thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred and fifteenth.

[SEAL.] GEORGE W. SPROULE, *Clerk.*

Endorsed: No. 7. U. S. circuit court of appeals for the ninth circuit. Northern Pacific Railroad Company, pl'ff in error, *v.* Junius G. Sanders *et al.*, def'ts in error. Transcript of record. Filed September 14th, 1891. F. D. Monckton, clerk.

76 At a stated term, to wit, the October term, A. D. 1891, of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Thursday, the seventh day of January, in the year of our Lord one thousand eight hundred and ninety-two.

Present: The Honorable C. H. Hanford, U. S. district judge, district of Washington, presiding; Honorable Thomas P. Hawley, U. S. district judge, district of Nevada; Honorable William W. Morrow, U. S. district judge, northern district of California.

NORTHERN PACIFIC RAILROAD CO.
vs.
JUNIUS G. SANDERS *et al.* } No. 7.

Error to the circuit court of the United States, district of Montana.

Ordered cause argued by F. M. Dudley, Esq., counsel for plaintiff in error, and W. F. Sanders, Esq., counsel for defendants in error, and continued to the 8th inst. for further argument.

77 At a stated term, to wit, the October term, A. D. 1891, of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Friday, the 8th day of January, in the year of our Lord one thousand eight hundred and ninety-two.

Present: The Honorable C. H. Hanford, U. S. district judge, district of Washington, presiding; Honorable Thomas P. Hawley, U. S. district judge, district of Nevada; Honorable William W. Morrow, U. S. district judge, northern district of California.

NORTHERN PACIFIC RAILROAD CO.
vs.
JUNIUS G. SANDERS *et al.*
No. 7.

Ordered cause further argued by W. F. Sanders, Esq., counsel for defendants in error, and F. M. Dudley, Esq., counsel for plaintiff in error, and submitted to the court for consideration and decision.

78 United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error,
vs.
JUNIUS G. SANDERS, WILBUR E. SANDERS, JAMES U. SANDERS, and SEREPTA SANDERS,
Defendants in Error.
Filed January 25, 1892.

Fred. S. Dudley, for pl'ff in error; Wilbur F. Sanders, for def'ts in error.

Before Hanford, J.; Hawley, J.; Morrow, J.

HANFORD, *J.:*

This action was brought by the Northern Pacific Railroad Company to recover possession of section 21, township 10 north, of range 3 west, in the State of Montana. By an amended complaint the plaintiff has pleaded the grant of lands made to it by act of Congress and the facts upon which it relies to establish its title to the premises as part of said grant; to said amended complaint defendants answered, admitting all the facts alleged by the plaintiff, but, to avoid the effect of such admissions and to contro-
79 vert the legal conclusions contended for by the plaintiff, set up by affirmative allegations certain additional facts. A general demurrer to this answer was overruled, and thereupon, the plaintiff having elected to not plead further, judgment was given for the defendants. By writ of error the case has been brought to this court for review.

The portions of the act of Congress which must be considered in deciding this case are here quoted:

"SEC. 3. That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores over the route of said railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption,

or other claims or rights, at the time the line of said road is definitely fixed, and the plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been
80 granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections." * * *

"SEC. 6. That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this act." * * *

The material facts of the case as stated in the pleadings are as follows: The land in controversy is an odd-numbered section of non-mineral land within the limits of the grant. On the 21st day of February, 1872, the plaintiff filed a map of its general route in the General Land Office, and on the 22nd day of April, 1872, the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, by a circular, directed the local land office for the Helena district, in which said land is situated, to withdraw from sale or location, pre-emption, or homestead entry all the odd-numbered sections of public lands within forty miles on each side of the line of general route of the plaintiff's road as fixed by
81 the filing of said map. On the 6th day of July, 1882, the portion of the line of the plaintiff's road opposite to the land in controversy was definitely located. On different dates, subsequent to receipt at the local land office of the circular above mentioned and prior to the definite location of the line of plaintiff's road, persons named in the answer located all of this section 21 as mining ground and endeavored to acquire title thereto from the Government under the laws relating to mineral lands of the United States. To show the nature of these supposed mining claims and what was done in asserting and endeavoring to maintain them we copy a portion of the answer:

"On the 2nd day of August, 1880, Theodore Kleinschmidt, Edward W. Knight, Henry M. Parchen, Charles K. Wells, George P. Reeves, David H. Cuthbert, Cornelius Hedges, and Stephen E. Atkinson, each being then and there a citizen of the United States and each having theretofore filed upon a certain separate twenty acres on the northeast quarter of said section according to the laws of the Territory of Montana and the mining usages and customs then in force in the unorganized mining district in which said land was situated and being in all respects qualified to enter mineral land under the laws of the United States, did enter into the possession of, and did enter in the United States land office, and did file upon said quarter of said section in the land office of the United States at Helena, Montana, in

which district said land was situated, as mineral land,
82 and did apply for a patent therefor, and did then and there and in due form file an application to purchase said premises as such mineral land, and did then and there make oath before the register and receiver of said land office that they had discovered minerals thereon and had located the said quarter section as mineral land and claimed the same as such for the valuable mineral deposits therein, and that they had complied with chapter 6 of title XXXII of the Revised Statutes of the United States, which said application was so filed in the land office of Helena, Montana, under the oath of the said applicants, showing that they had complied with the law aforesaid and describing the same by legal subdivisions, and they did then and there, prior to filing said applications, post in a conspicuous place on the claim embraced therein a copy of said application and notice hereinafter mentioned, which said notice did then and there remain conspicuously posted on said premises during the period of publication hereinafter mentioned, and they did then and there file with the said application in said land office an affidavit of two persons that such notice had been so duly posted, and did then and there file a copy of said notice in the land office with the register and receiver thereof, and by said application they requested to be permitted to purchase the same as mineral land, and they then and there undertook and offered to maintain by proof that the said premises were valuable for the gold contained therein and were mineral lands of the United States, to which they were entitled under the laws thereof, and that they had
done the requisite amount of work thereon, to wit, work of
83 the value of five hundred dollars, and were entitled to a patent therefor, which said application and affidavit and notice were then and there entered of record in said United States land office by the register and receiver thereof, and the said application was set for a hearing upon their said proofs to be produced, and notice of such hearing in due form of law was given by the register and receiver in the proper newspaper designated for that purpose, and was duly published therein, which said entry, application, affidavits, and notice were in all respects formal according to law, and the said application was set down for a hearing in said land office by the register and receiver thereof at the expiration of the period of time prescribed in said notice and at the date at which the same was so set, the said plaintiff having theretofore filed a protest against the perfection of the said entry for the reason, as claimed by said plaintiff, that the same was not mineral land or commercially valuable for the gold or other precious metals therein contained. The said application was continued thereafter by the consent of parties or otherwise from time to time, and was asserted and remained pending on the 6th day of July, 1882, and thereafter the said applicants on the said 6th day of July, 1882, and thereafter, as theretofore, averring their ability to prove that the said land was commercially valuable for the gold therein contained, and was mineral land within the definition of that phrase contained in the act granting lands to

said plaintiff mentioned in said amended complaint, and the
84 said applicants were on the date last aforesaid claiming, affirming, and undertaking to maintain on their application for said premises in said land office that the same was mineral land of the United States, to which they were entitled thereunder, and was not land in quality such as was described in the grant to the said plaintiff."

The answer makes similar averments as to the other three-quarters of the section and further alleges:

"And as to the said proceedings and each and all of them in the office of the county clerk and recorder of said county of Lewis and Clarke, Montana, in which county said premises are situated, and in the United States land office at Helena aforesaid, they were in the form prescribed by law for the claim and entry of placer mining claims, and thereafter, to wit, on the 4th day of August, 1887, the said plaintiff presented to the said register and receiver a list of land selected by it as having been granted to it by the act aforementioned and claimed by it thereunder, to be approved to the end that the said premises in said list described might be certified to it for patent, which list included said section twenty-one, but to approve said list or certify said lands to said company the said register and receiver and the Land Department of the United States refused because of the existence on the 6th day of July, 1882, of the foregoing claims to the same as mineral lands."

Subsequently to the 6th day of July, 1882, the defendants
85 entered into the occupancy of said section 21, and at the time this action was commenced they were in possession of the same.

The case as made presents this distinct question of law: Is the land described excluded from the grant to the Northern Pacific Railroad Company because not free from claims other than pre-emption claims at the time of the definite location of the line of plaintiff's road? We do not find in the cases wherein the Supreme Court has construed the grant to this company any decision of this precise question, therefore we must be guided in our decision, in so far as the case differs from cases which have been decided by the Supreme Court, by elementary rules. Considering the act as a whole, and its purpose and object, and giving to every word of the granting clause some force and meaning and the usual signi-cance thereof, we conclude that Congress intended to and did except and reserve out of the grant (1) lands not owned in fee by the United States, (2) lands reserved, (3) lands sold, (4) lands granted to parties other than the Northern Pacific Railroad Company, (5) land otherwise appropriated, (6) lands subject to pre-emption claims, (7) lands subject to claims other than pre-emption claims, (8) lands subject to pre-emption rights, (9) lands subject to rights other than pre-emption rights, (10) land containing minerals other than iron or coal. To determine whether any particular odd-numbered section within the limits of the grant was included in or excluded from the grant, the condition
86 of the tract must be considered as it existed at the

time the line of the road opposite thereto was definitely fixed and the plat thereof filed in the office of the Commissioner of the General Land Office. The pre-emption claims and rights to which reference is made in the grant, probably, though not necessarily, are such claims and rights as may be asserted or acquired under the act of Congress commonly known as the pre-emption law, but there could be no reason for making special provisions for the protection of these which would not apply as well to claims and rights of settlers under the homestead law and to the claims and rights of prospectors and miners founded upon the laws made expressly to reward them for the capital invested, the labor performed and hardships endured in efforts to discover and develop the mineral resources of the country. It would therefore be unreasonable to so construe this law as to not exclude from the grant lands subject to claims and rights existing under the homestead law and all other laws providing for the disposal of the public lands of the United States and granting preferences to settlers, improvers, and discoverers, as well as the lands affected by the pre-emption law. The rule that general descriptive words in a statute, when connected with words of specific import, are to be understood as being qualified by the latter so as to include only things or acts of similar kind or nature to those specifically referred to is not violated by including in the exceptions and reservations of this grant the lands subject to the claims or rights of miners and pros-
87 pectors under the laws providing for the acquisition of mineral lands from the Government, for all such claims and rights are similar to claims and rights under the pre-emption law. The legislation by Congress relating to the acquisition by settlers upon unappropriated agricultural lands of limited portions thereof, including the improvements made by each, and the statutes providing for the disposal to discoverers and miners of limited portions of the mineral lands *has* been in pursuance of the general policy of the Government to bestow and distribute the public lands upon and among those citizens who will do the most to render it productive, and there is a general similarity in all proceedings in the land offices of the United States, by which under the general laws claims to particular tracts of public lands are made and titles perfected, sufficient at least to render the above-mentioned rule of construction inapplicable in the way in which plaintiff's counsel would have it applied in this case.

The argument is made that the act must not be so construed as to include claims to mineral lands as such in the same category with pre-emption or other claims to agricultural land. Two reasons are alleged in support of this proposition: First, the lands reserved from the grant are divisible into two classes—mineral lands, which are excluded from the grant by reason of the character of the land, regardless of the condition of the title, and lands exempted by reason of the condition of the title at the time of the definite fixing of the line of the road. It is said that as all
88 lands containing mineral other than coal or iron are excluded under the clause of the act referring to that descrip-

tion of lands the other class of exempted lands should not include any mineral lands, else the act will be subject to the criticism of uselessly providing two distinct grounds of exemption applicable to the same lands. Second, claims to mineral lands cannot be supposed to have been in contemplation of Congress in the making of this law, because at the date of the act there was "no act of Congress or any law under which a right or claim could be initiated to mineral lands."

We regard both reasons as insufficient and the proposition itself as unsound. The fault of the first argument is well illustrated by and a complete answer to it found in this very case. Whether the land is or not valuable for the mineral it contains is a question of fact which may be a subject of contention and cannot be decided without the production of evidence. As to this land, there was such a disputed question at the time the line of plaintiff's road opposite thereto was definitely fixed, and until the decision of that question by competent authority after due investigation it was not and could not be known whether the land was mineral or not. But the fact that an actual controversy existed concerning the title to this land, which necessarily affected the right of the plaintiff to receive the same as part of its grant, was known and appeared by the records in the Government land offices. The question was finally
89 decided adversely to the mineral claimants. Now, suppose that the decision was based upon false testimony, and that it is erroneous, or that the evidence had been different and an erroneous decision had been given in favor of the claimants. In either case, if the existence of a claim and litigation does not affect it, the right of the company to the land would depend less upon the actual truth as to its character than upon the decision of a contested claim, and it follows that the plaintiff would have an interest at stake and therefore a right to challenge every mineral claim covering any part of an odd-numbered section within the limits of its grant and a right to introduce evidence on its part to defeat every such claim. It requires no strain of mental vision to discover the possibility of erroneous decisions in numerous instances of valuable mines claimed by persons of insufficient means to develop the same or maintain a contest according to the rules and practice of the United States Land Department. The provisions of the act itself show that Congress did not intend that this company should have a standing as a contestant of any class of claims which the law recognizes antedating the definite location of the road, for not only is there an absolute omission of words limiting the application of the phrase "or other claims or rights" to non-mineral lands, but by the provision allowing the company to select lieu lands it is manifest that Congress was careful to guard against and as far as possible prevent
90 disputes and contention as to the lands which the company should receive. We have also the authority of repeated decisions of the Supreme Court for saying that the policy of the Government precludes an interpretation of such a grant, which would

in effect create a powerful contestant, with an interest to defeat individual claimants.

Sanger *vs.* Newhall, 92 U. S., 761.
Railroad Co. *vs.* Dunmeyer, 113 U. S., 629.
Railroad Co. *vs.* Whitney, 132 U. S., 357.

The second reason or argument is answered by the fact that the grant is not so worded as to imply that a claim to have the effect of excluding land from the grant must be founded upon an act of Congress or an express provision of any law. It would be a misconstruction of the law to even modify the force of the sentence by interpolating into it the adjective "lawful." As said in the opinion of the court by Mr. Justice Davis in Newhall *vs.* Sanger, 92 U. S., 765:

"There is no authority to import a word into a statute in order to change its meaning." Much less can there be any authority or justification for constructing a grant by narrowing a reservation made therein for the benefit of the people in general, by ascribing to it a meaning different from anything which its words express. Although there was no statute providing for the sale or bestowal of mineral lands at the time of the grant to plaintiff, Congress had the right to and did afterwards make such a law, and under it claims could be and were lawfully initiated prior to the defi-
91 nite fixing of the line of plaintiff's road. We think that the reservations in the plaintiff's grant were made in contemplation of future legislation as well as the then existing laws. We also hold that claims to mineral lands could be lawfully initiated by discovery, possession, and development, according to the custom of miners and local regulations, at and previous to the date of plaintiff's grant. For more than a score of years before there was a statute authorizing a conveyance from the Government of title to mineral lands, the mines found chiefly in the public lands of the United States, situated in California, Colorado, Nevada, and the other States and Territories west of the Rocky mountains, yielded their wealth to hundreds of thousands of individuals whose right to appropriate the precious metals extracted from their mining claims according to such customs and regulations was never questioned by governmental authority. In the opinion of the Supreme Court, in the case of Forbes *vs.* Gracey, 94 U. S., 763, it is said that "it is very true that Congress has by statutes and by tacit consent permitted individuals and corporations to dig out and convert to their own use the ores containing the precious metals which are found in the lands belonging to the Government, without exacting or receiving any compensation for those ores. It has gone further and recognized the possessory rights of these miners, as ascertained among themselves by the rules which have become the laws of the mining districts as regards mining claims. See Revised Stat-
92 utes, title XXXII, chap. 6, secs. 2318–2352. But in doing this it has not parted with the title to the land, except in cases where the land has been sold in accordance with the provisions of the law on that subject."

Just here seems to be a good place to remark that in the common parlance of the mining districts the word "claim," used as a noun, has a definite and particular meaning, denotin-, when coupled with the name of miner, a particular piece of ground to which that miner had a recognized, vested, and exclusive right of possession for the purpose of extracting precious metals therefrom, and there is reason to suppose that in framing the reservation clause of this grant Congress selected the word "claims" for the express purpose of excluding from the grant lands held in possession of and claimed by miners according to local customs.

It is next insisted that the mineral claims referred to in the answer were not simply voidable, but absolutely void *ab initio*, because the land is, in fact, non-mineral; and in support of this it is said that as mineral lands are reserved from sale and entry as agricultural lands so non-mineral lands are unaffected by the mining laws or the laws relating to entries of mineral lands, and the location and entry under the mineral laws of non-mineral land is unautcorized, and a patent issued upon such an entry would be as void as a patent for mineral lands issued under a grant excluding such lands from its operation. This is very well, but we do not understand that a patent issued to a settler under the homestead or pre-
emption laws would be void or even voidable by reason of
93 the mere fact that the land conveyed contains valuable mines.

The authorities cited certainly do not maintain that titles resting upon patents from the Government can be vitiated by the discovery of minerals subsequently to the issuance thereof. In the case of Mullen *vs.* U. S., 118 U. S., 271, the Supreme Court held that as the entryman knew beforehand that the land contained a coal mine he was guilty of misrepresentation and fraud in making the proofs upon which the patent was issued, and for that reason, at the suit of the Government, it was cancelled. In all the cases in which patents have been cancelled the courts have proceeded according to the familiar rules of equity and the Government has been required to allege and prove, by clear evidence, fraud or some other sufficient equitable ground for wresting the property from the parties sued.

The last proposition affirmed by counsel for the plaintiff is this: The land, being, in fact, non-mineral, was, by virtue of the 6th section of plaintiff's charter, from the date of the filing of a plat of the general route of the road in the General Land Office, reserved for the plaintiff's benefit, and no claim to it could be thereafter initiated whereby the plaintiff's right to it under its grant could be defeated. We yield full assent to the authorities holding that the 6th section of this charter creates a reserve of the odd-numbered sections within the limits defined from the time of the filing of a plat of the general route in the General Land Office; but the
reservation which this section makes is limited, and no
94 greater effect should be given to it than Congress intended.

This law does not purport to prohibit any person from going upon the land reserved from sale or entry or pre-emption for the purpose of hunting or fishing, nor prohibit cattle from grazing thereon, nor render unlawful a search for minerals, nor forbid the

taking up of mining claims in such lands by persons supposing the same to contain the precious metals in sufficient quantities to pay for working. The country at large had an interest to be subserved by the early discovery of all the mines contained in lands liable to be claimed by the plaintiff under its grant; and it is folly to suppose that if Congress had intended, contrary to the public interest, to prohibit the prospecting of a vast area of the public land through a region known to be rich in minerals or to deprive prospectors of the right to claim and hold supposed discoveries until the truth regarding the same could be ascertained in the only practicable way—that is, by development, requiring time and involving labor and the outlay of money—it would not have positively said so in plain words. Of the multitude of authorities cited the decision- of Mr. Justice Field and Judge Deady in the case of Denny *vs.* Dodson, 32 Fed., 899, and the case of Buttz *vs.* N. P. R. R. Co., 119 U. S., 334, are especially relied upon by the plaintiff's counsel. Denny *vs.* Dodson was an action of ejectment by a vendee of the Northern Pacific Railroad Company. The complaint alleged that the demanded premises were portions of an odd-numbered section within the limits of the grant fully earned by the company by com-
95 pletion of that part of the road opposite thereto and compliance on the part of the company with all requirements of the law, and that at the date of fixing the general route of the road said lands were public lands not mineral and not reserved, sold, granted, or occupied by homestead or other settlers nor otherwise disposed of or located upon and were free from pre-emption or other claims or rights, and to them the United States had full title, not appropriated otherwise than by the grant to said company. By the decision of the court a demurrer to said complaint was overruled.

From the opinion, by Mr. Justice Field, it appears that after the fixing of the line of general route of the road the lands were settled upon and at the time of the definite location of the line the same were occupied as a town site, and upon the demurrer it was argued that the complaint was insufficient for want of an allegation to the effect that at the latter date the lands were not claimed under the town-site law.

The court held that on account of the reservation made by the 6th section of the plaintiff's charter no entry of the land under the town-site act could be made after the date of filing a plat of the general route in the General Land Office, and therefore such an allegation in the complaint was unnecessary.

In Buttz *vs.* The N. P. R. R. Co. the contention was regarding part of an odd-numbered section within the limits of the grant
96 which had been settled upon while it remained part of the Indian country, not at the time open to settlement under the laws of the United States, because the Indian title had not been extinguished. It was the settler's intention at the time of commencing to occupy the land to acquire the title to it under the pre-emption law, and within three months after the township plats of the Governmen survey had been filed in the district land office he offered to

file his declaratory statement as a pre-emptor. The land was within the limits defined by an order of the Secretary of the Interior previously made withdrawing the odd-numbered sections therein from pre-emption entries under the sixth section of the plaintiff's charter, and for that reason the filing of said declaratory statement was not permitted. The Supreme Court held in effect that a claim of a mere squatter based upon nothing but an unlawful occupancy of lands will not be taken notice of by the Government for any purpose; that the offer to file declaratory statement under the pre-emption law was properly rejected by the officers of the land department, and that the land was not excluded from the grant to the railroad company by reason of the unrecognized claim of the squatter nor by reason of the fact that the right of occupancy of the Indians had not been completely extinguished at the time of the definite location of the road. These cases are not like the case at bar; it is clearly distinguishable from each of them by the important fact that the land in controversy was, at the time the grant ceased to be
97 afloat, affected by something more than a mere pretended claim, existing only in the mind of an individual; it was for the time being actually segregated from the body of the public domain by claims apparently genuine and lawful, appearing of record and recognized by the officers of the Government, and, as to the actual validity thereof, dependent only upon issues of fact to be thereafter determined by competent authority. By an unbroken line of decisions of the Supreme Court from the case of Wilcox *vs.* Jackson, 13 Peters, 498, to the case of St. Paul and Pacific R. Co. *vs.* Northern Pacific R. Co., 139 U. S., 1, the title to land so affected does not pass by a grant of "public land."

For the reasons above given, it is the decision of this court that the judgment of the circuit court for the district of Montana in this case be affirmed.

Endorsed: Filed January 25, 1892. F. D. Monckton, clerk.

98 United States Circuit Court of Appeals for the Ninth Circuit, October Term, 1891.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
JUNIUS G. SANDERS, WILBUR E. SANDERS, JAMES U. SANDERS, and SEREPTA SANDERS. } No. 7.

In error to the circuit court of the United States for the district of Montana.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Montana and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed.

Endorsed: Filed Jan'y 25, 1892. F. D. Monckton, clerk.

99 In the United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
JUNIUS G. SANDERS, WILBUR E. SANDERS, JAMES U. SANDERS, and SEREPTA M. SANDERS, Defendants in Error.

Assignment of Errors.

Now comes the said Northern Pacific Railroad Company, by its attorney, and says that in the record and proceedings in the above-entitled action in the United States circuit court of appeals for the ninth circuit there is manifest error, as follows, to wit:

I.

The said court held that the mineral locations, claims, and applications for patent for the northeast quarter (N. E. ¼) of section twenty-one (21), township ten (10) north, of range three (3) west, P. M. Montana, by Theodore H. Kleinschmidt, Edward W. Knight, Henry M. Parchen, Charles K. Wells, George P. Reeves, David H. Cuthbert, Cornelius Hedges, and Stephen E. Atkinson; for the northwest quarter (N. W. ¼) of said section by George P.
100 Reeves, Helen H. Reeves, Laura C. Ballow, John W. Eddy, Evelyn M. Eddy, Edward W. Knight, Theodora M. Knight, and Anna Natolia King; for the southwest quarter (S. W. ¼) of said section by Theodore H. Kleinschmidt, Henry M. Parchen, David H. Cuthbert, Stephen A. Atkinson, Lucius C. Rosecrans, Emma M. Parchen, Mary M. Kleinschmidt, and Anna E. Cuthbert; for the southeast quarter (S. E. ¼) of said section by Cornelius Hedges, Thomas A. H. Hay, Mary L. Guthrie, Patrick Quinn, Louis A. Walker, William D. Wheeler, Edna L. Hodges, George E. Carpenter, Russell B. Harrison, as set forth in the answer to the amended complaint herein, and the pendency of the contest or contests before the United States district land office between said parties and the said Northern Pacific Railroad Company as to the quality of the soil of said section at the time the line of said Northern Pacific railroad opposite to and within forty miles of said section twenty-one (21) was definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office, to wit, July 6, 1882, excluded said lands from the description of public lands to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights and operated to exclude said land from the grant to said Northern Pacific Railroad Company by the act of Congress approved July 2, 1864.

II.

The said court held that the mineral locations, claims, and
101 applications for patent for the northeast quarter (N. E. ¼) of said section twenty-one (21), township ten (10) north, of range three (3) west, P. M. Montana, by Theodore H. Kleinschmidt, Ed-

ward W. Knight, Henry M. Parchen, Charles K. Wells, George P. Reeves, David H. Cuthbert, Cornelius Hedges, and Stephen E. Atkinson; for the northwest quarter (N. W. ¼) of said section by George P. Reeves, Helen H. Reeves, Laura C. Ballow, John W. Eddy, Evelyn W. Eddy, Edward W. Knight, Theodosia M. Knight, and Anna Natolia King; for the southwest quarter of said section by Theodore H. Kleinschmidt, Henry M. Parchen, David H. Cuthbert, Stephen Atkinson, Lucius J. Rosecrans, Emma M. Parchen, Mary M. Kleinschmidt, and Anna E. Cuthbert; for the southeast quarter (S. E. ¼) of said section by Cornelius Hedges, Thomas A. H. Hay, Mary L. Guthrie, Patrick Quinn, Louis A. Walker, William D. Wheeler, Edna L. Hedges, George E. Carpenter, Russell B. Harrison, as set forth in the answer to the amended complaint herein, were not null and void and of no effect whatever.

III.

The court held that section twenty-one (21), township ten (10) north, of range three (3) west, P. M. Montana, although non-mineral in character, was subject to a mineral location, claim, or entry.

IV.

The said court held that the mineral locations, claims, and applications for patent for said section twenty-one (21), township
102 ten (10) north, of range three (3) west, P. M. Montana, as set forth in the answer to the amended complaint herein, operated to reserve, grant, or appropriate said lands or cause the same to cease to be free from pre-emption or other claims or rights so as to exclude the same from the grant to the Northern Pacific Railroad Company.

V.

The said court held that section twenty-one (21), township ten (10) north, of range three (3) west, P. M. Montana, was after said Northern Pacific Railroad Company fixed the general route of its road opposite thereto and within forty miles thereof, to wit, February 21, 1872, subject to location, claim, and entry under the laws of the United States providing for the location, claim, and entry of public mineral lands, although said land was in fact non-mineral.

VI.

The said court failed and declined to hold that said Northern Pacific Railroad Company was the owner of and entitled to the possession of said section twenty-one (21), township ten (10) north, of range three (3) west, P. M. Montana.

VII.

The said court held that the said answer to the amended complaint in the above-entitled action states facts sufficient to constitute a defence or counter-claim.

Wherefore said Northern Pacific Railroad Company prays
103 that the said judgment of the United States circuit court of appeals for the ninth circuit be reversed and that said cause shall be remanded to the United States circuit court for the district of Montana, and that said court be ordered to enter an order reversing the judgment therein and sustaining said demurrer.

FRED. M. DUDLEY,
Attorney for Northern Pacific Railroad Company.

Endorsed: Filed February 8th, 1892. F. D. Monckton, clerk.

104 In the United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
JUNIUS G. SANDERS, WILBUR E. SANDERS, JAMES U. SANDERS, and SAREPTA M. SANDERS, Defendants in Error.

Petition for Writ of Error.

To the Honorable Stephen J. Field, associate justice of the Supreme Court of the United States, assigned to the ninth circuit:

Now comes the said Northern Pacific Railroad Company, by Fred. M. Dudley, its attorney, and complains that in the records and proceedings and also in the rendition of judgment in the above-entitled cause in said United States circuit court of appeals for the ninth circuit, at the October term thereof, A. D. 1891, against said Northern Pacific Railroad Company, on the 25th day of January, A. D. 1892, manifest error hath intervened to the great damage of the said Northern Pacific Railroad Company.

Wherefore the said Northern Pacific Railroad Company prays for the allowance of a writ of error and such other process as
105 may cause the same to be corrected by the said Supreme Court of the United States.

A. H. GARLAND,
H. J. MAY AND
FRED. M. DUDLEY,
Attorney for Northern Pacific Railroad Company.

Endorsed: Filed March 28, 1892. F. D. Monckton, clerk.

106 In the United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
JUNIUS G. SANDERS, WILBUR E. SANDERS, JAMES U. SANDERS, and SAREPTA SANDERS, Defendants in Error.

Know all men by these presents that we, Northern Pacific Railroad Company, by George W. Board, its assistant land commissioner,

and St. Paul Title Insurance and Trust Company are held and firmly bound to Junius G. Sanders, Wilbur E. Sanders, James U. Sanders, and Sarepta M. Sanders, the above-named defendants in error, in the sum of five hundred dollars ($500.00), to be paid to said defendants, their heirs, executors, or administrators; for the payment of which, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our heirs, executors, administrators, or successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this tenth day of March, A. D. 1892.

Whereas the above-named Northern Pacific Railroad Company has prosecuted a writ of error in the Supreme Court of
107 the United States to reverse the judgment rendered in the above-entitled action by the United States circuit court of appeals for the ninth circuit, at the October term of said court, A. D. 1891.

Now, therefore, the condition of this obligation is such that if the above-named Northern Pacific Railroad Company shall prosecute its said writ of error to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

NORTHERN PACIFIC RAILROAD COMPANY,
By GEO. W. BOARD,
Ass't Land Commissioner.
ST. PAUL TITLE INSURANCE AND TRUST CO.,
By RAHIL S. DUNNE, *Vice-president.*

Signed and sealed in the presence of—
M. T. SANDERS.
Approved March 12th, 1892.

OSCAR B. HILLIS,
Clerk U. S. Circuit Court, District of Minnesota.

Approved:
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the U. S.
March 15th, 1892.

108 Endorsed: Bond on writ of error. Filed March 28, 1892. F. D. Monckton, clerk.

109 United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
JUNIUS G. SANDERS, WILBUR E. SANDERS, JAMES U. SANDERS, and SEREPTA SANDERS.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing one hundred and eight written and printed pages, numbered from 1 to

108, inclusive, to be a full, true, and correct copy of the record and of the proceedings in the above and therein entitled cause, and that the same together constitute the return to the annexed writ of error.

Attest my hand and the seal of said United States circuit court of appeals, at San Francisco, California, this 6th day of April, A. D. 1892.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

Endorsed on cover: Case No. 15,017. U. S. circuit court of appeals, ninth circuit. Term No., 390. The Northern Pacific Railroad Company, plaintiff in error, *vs.* Junius G. Sanders, Wilbur F. Sanders, James U. Sanders, and Sarepta M. Sanders. Filed April 13th, 1892.

166-620

FILED.
DEC 3 1895
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

166-620

THE NORTHERN PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,
v.
JUNIUS G. SANDERS ET AL.

No. 107.

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

Brief for Plaintiff in Error.

A. T. BRITTON,
A. B. BROWNE,
of Counsel.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1895.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

THE NORTHERN PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,
v.
JUNIUS G. SANDERS ET AL.
No. 107.

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This is an action in the nature of ejectment to recover possession of Section 21, Tp. 10 N., R. 3 W., in Lewis and Clarke county, Montana. Same was originally commenced by plaintiff in error in the First District Court of Montana Territory, and thence transferred to the United States Circuit Court (R. 11, 12).

The plaintiff in error claims title and right of posses-

sion by virtue of a grant from the United States made by section 3 of an Act of Congress approved July 2, 1864 13 Stats., p. 365), and alleges that the land being an odd-numbered section of vacant public lands, not mineral, at date of the filing of its map of general route (February 21, 1872) and included therein, it was not thereafter subject to adverse claim or disposal. The defendants in error contend that, by reason of certain pleaded facts, existing at date of definite location (July 6, 1882), the land falls within the statutory exceptions, and was therefore excluded from the grant.

Section 3 of the Act of Congress, approved July 2, 1864, entitled "An Act granting lands to aid in the con- "struction of a railroad and telegraph line from Lake "Superior to Puget Sound on the Pacific coast, by the "northern route," provides—

"That there be and hereby is granted to the 'Northern "'Pacific Railroad Company,' its successors and assigns, "for the purpose of aiding in the construction of said "railroad and telegraph line to the Pacific Coast, and to "secure the safe and speedy transportation of the mails, "troops, munitions of war, and public stores over the "route of said line of railway, every alternate section of "public land, not mineral, designated by odd numbers to "the amount of twenty alternate sections per mile on "each side of said railroad line, as said Company may "adopt, through the Territories of the United States, and "ten alternate sections of land per mile on each side of "said railroad whenever it passes through any State, and "whenever on the line thereof the United States have full "title, not reserved, sold, granted, or otherwise appro- "priated, and free from pre-emption or other claims or "rights at the time the line of said road is definitely "fixed, and a plat thereof filed in the office of the Com- "missioner of the General Land Office; and whenever, "prior to said time, any of said sections, or parts of sec-

" tions, shall have been granted, sold, reserved, occupied " by homestead settlers, or pre-empted, or otherwise dis- " posed of, other lands shall be selected by said Company " in lieu thereof, under the direction of the Secretary of " the Interior, in alternate sections and designated by odd " numbers, not more than ten miles beyond the limits of " said alternate sections: provided, that if said route shall " be found upon the line of any other railroad route to " aid in the construction of which lands have been here- " tofore granted by the United States, as far as the routes " are upon the same general line, the amount of land " heretofore granted shall be deducted from the amount " granted by this Act: provided further, that the railroad " company receiving the previous grant of land may as- " sign their interest to said 'Northern Pacific Railroad " 'Company' or may consolidate, confederate, and asso- " ciate with said Company upon the terms named in the " first section of this Act: provided further, that all min- " eral lands be, and the same are, hereby excluded from " the operations of this Act, and in lieu thereof a like " quantity of unoccupied and unappropriated agricultural " lands, in odd-numbered sections, nearest to the line of " said road may be selected as above provided: and pro- " vided further, that the word 'mineral,' when it occurs " in this Act, shall not be held to include iron or coal: " and provided further, that no money shall be drawn " from the Treasury of the United States to aid in the " construction of said 'Northern Pacific Railroad.'"

The Sixth Section of said Act provides for the protection of odd-numbered sections within forty miles in width on both sides of the general route when fixed, as follows:

" That the President of the United States shall cause " the lands to be surveyed for forty miles in width on " both sides of the entire line of said road, after the gen- " eral route shall be fixed, and as fast as may be required " by the construction of said railroad; and the odd sec- " tions of land hereby granted shall not be liable to sale, " or entry, or pre-emption before or after they are sur-

" veyed, except by said Company, as provided in this Act;
" but the provisions of the Act of September, eighteen
" hundred and forty-one, granting pre-emption rights, and
" the Acts amendatory thereof, and of the Act entitled
" 'An Act to secure homesteads to actual settlers on the
" 'public domain' approved May twenty, eighteen hundred
" and sixty-two, shall be, and the same are hereby, ex-
" tended to all other lands on the line of said road, when
" surveyed, excepting those hereby granted to said Com-
" pany. And the reserved alternate sections shall not be
" sold by the Government at a price less than two dollars
" and fifty cents per acre when offered for sale."

The pleadings admit that plaintiff in error, on February 21, 1872, filed in the office of the Commissioner of the General Land Office a map of the general route of its road, extending opposite to and within forty miles of the land in controversy; that said Commissioner, under direction of the Secretary of the Interior, on April 22, 1872, ordered withdrawal from sale or location, pre-emption, or homestead entry of the odd-numbered sections within the forty mile limits of said general route; and that such order of withdrawal was received at the local land office May 6, 1872. (R. 14, 23, 24.)

They admit that at either and all of those dates the land was public land, not mineral, to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights.

They admit that the map of definite location of the road was filed with the Commissioner of the General Land Office on July 6, 1882; that the road has been duly constructed and accepted, and that Section 21 is situate within two miles of said located and constructed line. It is also averred by the complaint, and admitted by both the original and the amended answers of defendants, that

the land is agricultural in character. The admission in the original answer was (R. 7):

"Come now the defendants * * * and, as to the "said complaint therein for the recovery of said land, "admit that it is and at all times heretofore was not min- "eral land." * * *

The admission in the amended answer is (R. 17):

"confessing that said premises did not contain gold, or "other precious metals in paying quantities, or in such "quantity as to make the same, or any thereof, commer- "cially valuable therefor." * * *

Though not stated in the pleadings, yet it is matter of public record in the Land Department, and in harmony with the pleadings, that Sec. 21 was surveyed in 1868, was returned as agricultural lands, and has ever since been so classified by the Government.

The controversy, then, concerns an odd-numbered section of public lands, not mineral, which at date of the grant (July 2, 1864), and of the filing of the map of general route, February 21, 1872, and of the Executive withdrawal of lands thereon was admittedly in all respects subject to the grant to the plaintiff, and was within the place limits thereof. But the answer of defendants in error sets up as affirmative defence that at *date of the filing of the map of definite location, on July* 6, 1882, the section in controversy was not public land to which the United States *then* had full title, not reserved, sold, granted, or otherwise appropriated, because said defendants, being duly qualified parties, during 1880 and 1881 had located said section with sundry placer mining claims, and had thereafter but prior to aforesaid definite location made application at the proper Local Land Office to pur-

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chase same from the United States under the provisions of the mining law; that during the period of the statutory publication of said application the Railroad Company had protested against its allowance upon the claim that the lands were agricultural and not mineral, and that the consequent investigation as to the character of the land was pending and undetermined on July 6, 1882, when the Railroad Company filed its map of definite location. Hence, the defendants contended that though the land was admittedly agricultural, yet that their pending mineral applications constituted such "other claims or rights" under Section 3 of the railroad grant as to except the lands from the identification of the definite location, the previous statutory and executive withdrawals upon general route to the contrary notwithstanding.

This contention was sustained by the United States Circuit Court for the District of Montana, and that judgment having been affirmed by the Circuit Court of Appeals for the Ninth Circuit, the present writ of error was sued out.

ASSIGNMENT OF ERRORS.

The errors are duly assigned (R., pp. 70-72).

ARGUMENT.

This case turns upon the decision of two main propositions:

First. The land in controversy having been at all times admittedly agricultural, and having, at date of the grant in 1864, and at date of the filing of map of general route in 1872, and of the statutory and Executive withdrawals thereunder, been admittedly an odd-numbered section of

vacant public lands, not mineral, within the place limits of the grant to which the United States had full title, not then reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, could any "claims" subsequently initiated by individuals operate to take the land out of the grant?

SECOND. If the land remained subject to the initiation of "claims" until date of filing the map of definite location, was the pendency of an inquiry as to the mineral or non-mineral character of the land a "claim" within the exceptions of the statute?

FIRST.

The Circuit Court in its two decisions in this case by Mr. Justice Knowles has held broadly that Section 6 of the Act of July 2, 1864, *supra*, does not withdraw any lands from market until the filing of the map of definite location, and the decisions of this Court affirming a legislative withdrawal upon the filing of the map of general route are summarily swept aside by terming them *obiter dicta*. Both the Circuit Court and the Circuit Court of Appeals have also held that, even conceding a withdrawal upon general route, its operation was restricted by the express terms of the law to "the odd sections of land hereby granted" which could only be identified by definite location, and that the reservation being expressly against "sale or entry or pre-emption" does not "render "unlawful a search for minerals, nor forbid the taking up "of mining claims in such lands by persons supposing "the same to contain the precious metals in sufficient "quantities to pay for working."

The construction of the Court below not only practically eliminates Section 6 from the Northern Pacific grant,

but it directly antagonizes the entire policy of the land-grant system as always enforced by the Land Department and as repeatedly construed by *this* Court. From the earliest days of public grants of lands to canals and to railroads, it has been the uniform practice of the Land Department of the United States to make preliminary withdrawals upon conjectural lines for the protection of proposed or of actual grants, and both the policy and the validity of such executive action as matters of wise administration have been repeatedly approved of and affirmed by this Court. In some instances these withdrawals were made by Executive authority, so as to embrace all lands within a given State (*Spencer* v. *McDougal*, Oct. term, 1894); in other cases, to protect lands assumed to have been granted, but which were never, in fact, granted (*Wolsey* v. *Chapman*, 101 U. S. 755); in other cases, to protect the probable range of grants, which Congress simply had under consideration; and in other cases, to enable actual grantees to run trial lines until they could safely adopt a satisfactory line of definite route. Such Executive practice continued from the early twenties until 1862. Then these Congressional grants reached the first of the transcontinental roads (Union and Central Pacific), and a distinct provision was inserted in Section 7 of the granting Act of July 1, 1862 (12 Stats. 489), requiring the filing of a map of general route and directing the withdrawal of lands thereon to await the subsequent definite location of the road. This simply added the express protection of legislative authority to the protection which had theretofore been afforded by Executive orders; and this statutory policy was repeated in the subsequent transcontinental grants to the Northern Pacific by the Act of July 2, 1864 (13 Stats. 365), and to the Atlantic and Pacific by the Act of July 26, 1866 (14 Stats. 292).

It was the plain purpose of Congress to permit the Northern Pacific Railroad Company to bring to the attention of the Interior Department a general route of its proposed road. The argument of the Court below that there was no express *direction* to file a map of general route is inconsequential. If a line of general route was to be established so as to be the basis for a prohibition from sale, &c., it follows necessarily that information of it must be given in some competent way to the Federal Land Department. The customary and approved way of giving that information so as to be binding and effective is by the delineation of such route upon a map and the filing thereof with the Interior Department. This general route was preliminary in the sense that it was not necessarily to be the fixed location upon which construction should be completed. It was expected that upon careful survey, perhaps of many trial lines, the line of finally located and constructed road might and would be varied from the line of general route preliminarily adopted and reported. The grant was to aid in the construction of a great postal and military railroad extending from Lake Superior to Puget Sound. Congress perfectly well knew, better even than in its previous grant to the Union and Central Pacific roads, that the line would extend through an unexplored wilderness, over prairies, through canyons, and under or over mountains; and that in the nature of things a long time would be required to locate and finally adopt a line for construction which could not thereafter be changed without the consent of Congress. It was not in the public interest that the Company should, in order to preserve its grant, make undue haste in fixing its final route. The road was to last forever. It was to be a post road, and for obvious reasons was regarded as of national importance. Its construction upon a satisfactory route

was essential, and that necessarily involved the running of trial lines for experimental and comparative purposes. To enable this to be done and at same time to preserve the grant from private appropriation, the designation of a general route was authorized, with attendant withdrawal of the odd-numbered sections situate within forty miles on each side thereof. That withdrawal took effect *proprio vigore*. It was, moreover, reinforced by immediately subsequent Executive withdrawals, which gave proper notice of the law through the local Land Offices to the general public. Independent of the statutory withdrawal, and disregarding the claims or rights of the railroad grantee, this Executive withdrawal must be regarded in the light of the repeated decisions of this Court as a complete reservation of the lands from subsequent disposal under the public land laws.

By this withdrawal of the odd-numbered sections upon general route, it was the obvious purpose of Congress to preserve the land from being taken up adverse to the grant pending the definite location and construction of the road. That purpose had been common to the executive administration of all prior land grants, and was expressly legislated by Congress in case of the other transcontinental roads. To hold it inapplicable to the Northern Pacific grant would be to engraft upon that legislation an exceptional provision which would tend to defeat the grant and which is unwarranted by anything in its language or spirit. Upon such a construction it would have been to the plain interest of the Company not to file a map of general route, nor to do any other public act which would give notice of its probable line. Necessarily, the making of the grant by Congress, its acceptance by the Company, and the filing of its map of general route would attract vast numbers of public land claimants. The public eye would

be turned wistfully to the new domain about to be made prosperous by the construction of a great transcontinental road; and if the odd sections, not mineral, were to remain open to disposal under the ordinary public land laws, the grant would be vastly depleted, and its avowed purpose to aid the construction of the road would be defeated. Section 6 was to prevent this, and it was in harmony with the administrative and with the Congressional policy as to all other grants. The definite location might or might not fall within the lateral limits of this general route, although it was doubtless expected that it would do so. If it did so fall, then the lands were absolutely preserved for the construction of the road by the withdrawal on general route by Section 6 and from and after that date. If it did not so fall, then the lands outside the limits of the general route prohibition were subject to disposal under the general public land system until filing of the map of definite location, and pursuant to the provisions of Section 3. This gives consistent effect to both sections.

"Nor is there anything inconsistent with this view of "the 6th section as to the general route, in the clause in "the third section, making the grant operative only upon "such odd sections as have not been reserved, sold, "granted, or otherwise appropriated, and to which pre-"emption and other rights and claims have not attached, "when a map of the definite location has been filed. The "third section does not embrace sales and pre-emptions "in cases where the sixth section declares that the land "shall not be subject to sale or pre-emption. The two "sections must be so construed as to give effect to both, if "that be practicable."

Butts v. *Northern Pacific R.R.*, 119 U S. 55, 72.

Our contention has the support of uniform Executive

construction, and it has been affirmed with no uncertain sound in repeated decisions of this Court. It was first so decided by the Secretary of the Interior on March 15, 1873, in an elaborate opinion (Copp's Public Land Laws, 377) wherein he directed cancellation of all entries or locations made subsequent to the filing of the map of general route and within the lateral limits thereof. That decision has been ever since followed by the Interior Department in its administration of this grant. It was decided in Buttz *v.* Northern Pacific, *supra*, wherein this Court said (pp. 71, 72):

"The Act of Congress not only contemplates the filing "by the Company in the office of the Commissioner of the "General Land Office of a map showing the definite loca- "tion of the line of its road, and limits the grant to such "alternate odd sections as have not at that time been re- "served, sold, granted, or otherwise appropriated and are "free from pre-emption, grant, or other claims or rights, "but it also contemplates a preliminary designation of the "general route of the road, and the exclusion from sale, "entry, or pre-emption of the adjoining odd sections "within forty miles on each side, until the definite loca- "tion is made. The third section declares that, after the "general route shall be fixed, the President shall cause "the lands to be surveyed for forty miles in width on both "sides of the entire line as fast as may be required for the "construction of the road, and that the odd sections "granted shall not be liable to sale, entry, or pre-emption "before or after they are surveyed, except by the Com- "pany. The general route may be considered as fixed "when its general course and direction are determined "after an actual examination of the country, or from a "knowledge of it, and is designated by a line on a map "showing the general features of the adjacent country, "and the places through or by which it will pass. The "officers of the Land Department are expected to exer- "cise supervision over the matter so as to require good

" faith on the part of the Company in designating the gen-
" eral route, and not to accept an arbitrary and capricious
" selection of the line irrespective of the character of the
" country through which the road is to be constructed.
" When the general route of the road is thus fixed in good
" faith, and information thereof given to the Land Depart-
" ment by filing the map thereof with the Commissioner
" of the General Land Office or the Secretary of the Inte-
" rior, the law withdraws from sale or pre-emption the
" odd sections to the extent of forty miles on each side.
" The object of the law in this particular is plain; it is to
" preserve the land for the company to which, in aid of
" the construction of the road, it is granted."

This doctrine was reaffirmed by this Court in
St. Paul and Pacific v. *Northern Pacific*, 139 U. S. 18.
U. S. v. *Southern Pacific*, 146 U. S. 599.

The contention of the Circuit Court that Section 6 can apply only to definite location, because the inhibition therein is against the sale of lands "hereby granted," which could only be identified by definite location, is obviously unsound. It is an argument which "sticks " in the bark." It makes Section 6 pure surplusage, as Section 3, in such case would be exhaustive. The words "hereby granted" are obviously synonymous with the odd-numbered sections within forty miles on each side of the general route. It was so decided by the Secretary of the Interior in his original construction of Section 6 on March 15, 1873, *supra*, wherein he held:

"If it be said that the words 'hereby granted' refer to
" the grant made by the third section, that such grant was
" for odd sections undisposed of at the date of definite
" location, and that these sections are the ones protected
" from sale, it must be admitted that Congress took great
" care to protect in explict language in the sixth section

"what was already perfectly protected by the third. "* * * What, then, was the necessity for this clause "of the sixth section, and in what is it more than mere "surplusage, if it has not a broader meaning than the one "suggested? The odd sections granted being, by the "third section itself, protected after definite location, it "follows that if any force or effect whatever is to be "given to the clause in question in the construction of "the Act, it must be held to extend protection to the odd "sections prior to definite location. Congress must not "be presumed to have done a needless and unnecessary "thing, as it certainly would have done had it protected "rights by the sixth section already fully and perfectly "protected by the third."

And this Court has expressly decided this question.

In *Winona and St. Peter R.R. Co.* v. *Barney* (113 U. S. 626) it was contended that indemnity could not be selected for losses prior to the grant, because the indemnity was only for losses in lands "hereby granted," which contention was overruled by this Court, as follows:

"It is no purpose to say against this construction that "the Government could not grant what it did not own, "and therefore could not have intended that its language "should apply to lands which it had disposed of. As "already said, the whole act must be read to reach the "intention of the lawmaker. It was, indeed, words of "grant, words which purport to convey what the grantor "owns, and, of course, cannot operate upon lands with "which the grantor had parted; and therefore, when it "afterwards provides for indemnity for lost portions of "the lands 'granted as aforesaid,' *it means of the lands "purporting to be covered by those terms.*" * * *

The Court of Appeals holds that as the Northern Pacific grant does not prohibit prospectors from exploring for minerals within the limits of the withdrawal upon general route, nor the making of mineral locations therein, there-

fore mineral entries are permissible upon any lands within such reservation, at least to extent and effect of taking such lands out of the railroad grant, irrespective of their real character. This is a *non sequitur*. Because these lands, after the general route withdrawal, are open to exploration for minerals, and to purchase if any minerals be discovered thereon, it by no means follows that they are subject to location and purchase if mineral be *not* found. Because the reservation on general route will not prevent the discovery of a mine or the entry of mineral land, *non constat* that such reservation will not protect the non-mineral lands. By the discovery of mineral, and by that alone, the land is taken out of the reservation, and is thereafter subject to location and entry; but unless the mineral is discovered thereon the reservation is in full force and effect.

The Circuit Court of Appeals further held that—

"This law does not purport to forbid the taking up of "mineral claims in such lands by persons supposing the "same to contain the precious metals in sufficient quan-"tities to pay for working it" (Rec., pp. 67, 68).

This is an erroneous statement. Actual discovery of mineral is a condition precedent to the right to make a mineral location (U. S. R. S. Secs. 2319, 2320. Purely speculative locations are not permissible. Says this Court in *Erhardt* v. *Boaro* (113 U. S. 527, 536):

"A mere posting of a notice in a ridge of rocks, crop-"ping out of the earth, or in other ground, that the "poster has located thereon a mining claim, without any "discovery or knowledge on his part of the existence of "metal there, or in its immediate vicinity, could be justly "treated as a mere speculative proceeding, and would "not, itself, initiate any right."

So also in *U. S.* v. *Iron Silver Mining Company* (128 U. S. 673, 675):

"It is the policy of the Government to favor the development of mines of gold and silver and other metals, and every facility is afforded for that purpose; but it exacts a faithful compliance with the conditions required. *There must be a discovery of the metal and a sufficient exploration of the ground to show this fact beyond question.*"

As it is conceded that the land here in controversy was and is non-mineral, and that no discovery was or could be made thereon, it was not taken out of the reservation upon general route. The pretended location and application to purchase were made in the face of the positive prohibition of the statute, and were and are void—mere nullities and ineffective for any purpose.

SECOND.

If, however, the land remained subject to the initiation of "claims" until date of filing the map of definite location, was the pendency of an inquiry as to the mineral or non-mineral character of the land a "claim" within the meaning of the statute?

The contention of the defendants in error, sustained by the courts below, is that, under the express terms of the grant in Section 3, Congress reserved to the United States the right, free from possible interference by the railroad grantee, to determine, *inter alia*, the validity of mere "claims" existing at date of definite location to any of the prescribed odd-numbered sections; that such claims *in fieri* at date of definite location were expressly excepted from the grant, indemnity provision being made

therefor; and that though lands are admittedly non-mineral, the mere pendency at date of definite location, though not at date of grant nor of designation of general route, of an application to purchase them as mineral land brings such lands within the exception of the statute.

Conceding then, *pro argumento*, that Section 6 of the granting Act cuts no figure in the case, the question is whether the facts set up by defendants in error bring their case within the exception of the law. The facts disclose purported placer locations in 1880 and 1881 with the Local Mining Recorder admittedly without discovery of mineral:—applications to the United States to purchase as mineral lands admittedly agricultural, and always classified by the United States as agricultural, and the pendency of an inquiry before the United States Local Land Office as to the character of the lands, whether mineral or non-mineral at time of definite location of the railroad. Do these facts constitute such a "claim" as is excepted from this grant by Section 3 thereof?

The error in the contention of defendants in error lies primarily in their failure to distinguish between lands not granted at all by reason of their character or location and lands which, though *prima facie* granted, were excepted therefrom by reason of "claims" existing and undetermined at date of definite location. Lands beyond a prescribed distance from the line of definite location were *not granted;* even-numbered sections within the prescribed limits were *not granted;* sections not public lands were *not granted; mineral* lands were *not granted;* as to *such* lands, their status at date of definite location was wholly immaterial. Whether claimed or not claimed, they could never inure to the railroad grant. The Railroad Company has no standing in Court against them, nor right to contest them, nor to do anything about them, not because

they were covered by "claims" at any given date, but solely because, claimed or unclaimed, they were *never* within its right.

The distinguishing feature is that from the *lands granted*, viz., odd-numbered sections of "public lands not mineral," within prescribed limits, the law carves out an exception, *inter alia*, of "claims" existing at date of definite location. The exception is not from lands never granted. It is only from public agricultural lands, which though granted and which though in all respects subject to the grant at its date, yet, at subsequent date of identification of the grant by definite location, were covered by "claims," and hence *then and for that reason* excepted from the operation of the grant. Mineral lands were never granted. They were expressly *excluded* therefrom, and hence there is no possible reason to apply a limitation to or an exception *from* the grant to something which was never *in* the grant. The "claims" or "rights" which are excepted from the grant include only those "claims or rights" which in contemplation of law could *attach* to non-mineral lands. If, at the time the grant attached, there were subsisting claims, pre-emption or otherwise, to lands which, but for such claims, would enure to the grant, the mere existence of such "claims" would exclude the lands from the grant. It certainly was not intended that mineral claims should so operate, because mineral lands are not excluded from the grant because of claims, but because they are mineral. Being mineral, they are not a part of the grant, wherever situate or howsoever claimed. Mineral lands to which there was no claim at date of definite location were still public lands of the United States open to location. That which is excluded is not granted. To that which is not granted at all, there is no room for the application of the exceptions of Section 3 from that which was granted.

The courts below are in grave error in giving to the case of defendants in error any of the attributes of a claim within the meaning of Sec. 3, which plaintiff in error was barred from combating. If a citizen had put upon the public record his declaratory statement under the pre-emption law, or his entry under the homestead law, and same was subsisting and uncancelled at date of definite location, the Railroad Company would not be permitted to challenge the validity of such claim by proof that the record was not followed up or supported by settlement or other affirmative compliance with the conditions of the law. But if, for instance, the grant should have been of mineral lands only, upon which homestead and pre-emptions are expressly prohibited, it would certainly have been lawful and competent for the railroad grantee to antagonize a pre-emption or homestead claim to such lands to the extent of showing that they *were* mineral lands. The converse of this is equally true. It is similarly competent for the railroad grantee to antagonize a mining claim upon agricultural lands by proving that the lands *are* agricultural. It is not an effort upon the part of the railroad to show that the alleged mineral claimants have not complied with this or that requirement of the law or regulations, and that their cases should fail by reason thereof. If the land *is* mineral, the railroad company has no standing in Court to determine whether mineral claims thereto are otherwise good, bad, or indifferent. Its right, however, is clearly to show that, the land being agricultural, there never was any authority of law for the attachment thereto of claims under the mining laws, whether *prima facie* or otherwise. Such mineral claims to lands admittedly agricultural do not present a case of the doubtful application of a statute; it is a case of absolute prohibition. It is not a voidable; it is a void thing. We

submit it to be a sound contention that the "claims or "rights" mentioned in the exceptions from the grant are claims or rights that, like pre-emption claims, can, in contemplation of law, attach only to the class of lands contemplated by the granting act, viz., non-mineral lands; and do not include a "claim or right" that can by law attach only to the class of lands absolutely excluded from the grant. Having already and expressly excluded mineral lands from the grant, Congress could never have intended that claims to mineral lands should be embraced within the subsequent exceptions from the class of lands which was granted. It is the reasonable construction to confine the word "claims" to lands which *but for the claims* would pass by the grant. As was held in *Barden* v. *Northern Pacific* (154 U. S. 316),—

"Mineral lands being absolutely reserved from the in-
"ception of the grant, Congress further provided that *at*
"*the time of the location* of the road other lands should
"be excepted, viz., those previously sold, reserved, or to
"which a homestead or pre-emption right had attached."

The fallacy in the contention of defendants in error is further evidenced by the manifestly incorrect position which his theory compels him to assume. As they rely entirely upon the exception of "claims" from the grant by Section 3, they necessarily cut the application of such exception off at the date of definite location. They assert that when the grant was identified by definite location, and the right of the railroad thereby vested, their "claim," good, bad, or indifferent, was pending and undetermined, and that settles the matter. The logical sequence is that if their claim had been *initiated* a day after the definite location, it would have been worthless as an exception to the railroad grant. Now, whilst that may be true as to

claims to the classes of non-mineral lands purporting to pass by the grant, it is not true as to mineral lands, which were never granted. The U. S. Land Department has special jurisdiction to inquire into the question of the mineral or non-mineral character of the land down to the actual issue of the patent therefor. The definite location cuts off the initiation of rights to lands of the character granted, but it does not in the slightest degree limit the continuing power of the Land Department to investigate and determine the facts upon which it must settle the question whether the lands were or were not granted, *because of their mineral character*. As was said by this Court in the Barden case, *supra*,—

"It is true the grant was a float, and the locations of the "section could not be made until the line of the proposed "road had become definitely fixed. The ascertainment "of the location of the sections in no respect affected the "nature of the lands, or the conditions on which their "grant was made. If swamp lands or timber lands or "mineral lands previously, they continued so afterwards."

And the same decision decided that the jurisdiction of the Land Department to determine the mineral or non-mineral character of land in this very Northern Pacific grant here in controversy extended to the actual issue of patent, the Court therein saying:

"It can hear evidence and determine the character of "lands to which different parties assert a right; and when "the controversy before it is fully considered and ended, "it can issue to the rightful claimant the patent provided "by law, specifying that the lands are of the character for "which a patent is authorized. It can thus determine "whether the lands called for are swamp lands, timber "lands, agricultural lands, or mineral lands, and so desig-"nate them in the patent which it issues. The act of

" Congress making the grant to the plaintiff provides for " the issue of a patent to the grantee for the land claimed, " and as the grant excludes mineral lands in the direction " for such patent to issue, the Land Office can examine " into the character of the lands and designate it in its " conveyance."

* * * * * * *

" The fact remains that, under the law, the duty of de- " termining the character of the lands granted by Congress, " and stating it in instruments transferring the title of the " Government to the grantees, reposes in officers of the " Land Department. Until such patent is issued, defin- " ing the character of the land granted and showing that " it is non-mineral, it will not comply with the Act of " Congress in which the grant before us was made to " plaintiff."

We submit, the general rule has been settled to be that whilst claims to lands of the character granted cannot be initiated after date of definite location and operate as exceptions, if *in fieri* at that date, the *character of land* is open to inquiry until actual issue of patent. If prior to that date found to be mineral, it is and always was excluded from the grant. If found to be agricultural, it was granted, and was not excepted therefrom by pretended mineral locations.

Our contention is strengthened by the fact that Congress has recently given a legislative rule for our guidance. An Act approved February 26, 1895 (28 Stats. p. 683), pro- " vides for the examination and classification of certain " mineral lands in the States of Montana and Idaho." It provides a Commission empowered, subject to approval of the Secretary of the Interior, to determine the mineral or non-mineral character of " all lands " within certain named land districts, one of which is the Helena Land District, and includes the lands here in controversy. It inhibits the issue of patents or other evidences of title to this Railroad Company for any land in such districts until such land has been examined and classified as non-min-

eral; and it provides that the "classification, when ap- "proved by the Secretary of the Interior, shall be con- "sidered final, except in case of fraud, and all plats and "records of the Local and General Land Offices shall be "made to conform to such classification."

This is a direct legislative assertion of right to try and to determine the mineral or non-mineral character of lands within this Northern Pacific grant without reference to date of definite location. It completely negatives the theory of defendant in error that the definite location fixes a period of time at which finally ceased and was forever determined the power to investigate the *character* of the land. It removes all doubt as to the distinction between "claims" to the character of land granted, and which could *prima facie* be perfected thereto, and between, on the other hand, an inquiry as to whether *lands* were of the character granted. It clearly marks the line between an inquiry as to claimant's compliance with law and an ascertainment of the true classification of land.

We submit, in conclusion, that the land in controversy being public land, admittedly non-mineral, and having been in all respects subject to the grant at date thereof and also at date of the filing of map of general route, it was—

First. Reserved from adverse appropriation under the public land laws both by the legislative withdrawal on general route and by the immediately subsequent Executive order of withdrawal.

Second. That it does not fall by reason of the pretended claim of defendants in error within any of the exceptions to Section 3 of the granting Act.

We submit that the judgment below should be reversed.

Respectfully submitted.

A. T. BRITTON,
A. B. BROWNE,
Attorneys for Plaintiff in Error.

166-620 12

JAN 11 1

JAMES H. McKE

SUPREME COURT

OF THE UNITED STATES.

THE NORTHERN PACIFIC RAILROAD COMPANY,

Plaintiff in Error,

vs.

JUNIUS G. SANDERS, ET AL.,

Brief for Plaintiff in Error.

JOHN C. SPOONER,
C. W. BUNN,
Of Counsel.

SUPREME COURT
OF THE UNITED STATES.

THE NORTHERN PACIFIC RAILROAD COMPANY,

Plaintiff in Error,

vs.

JUNIUS G. SANDERS, ET AL.,

Brief for Plaintiff in Error.

In briefly stating our views we do not hope to add much to the clear and convincing argument made by Mr. Britton and Mr. Browne in their brief.

Do the words "or other claims or rights," used in Sec. 3 of the Northern Pacific charter include *mineral* claims filed upon land admittedly *not* mineral?

The act is a law, as well as a grant, and is to be read as a whole, with a view to ascertain the intent of congress. No intent to make a departure from the general object of the act, or from the general policy which has controlled congress in similar legislation, is to be presumed.

The reasonable and necessary construction of

such granting acts is to restrict the application of such exceptions as we are here considering to lands, *which but for the fact creating the exception would be within the grant.* It is not reasonable to impute to congress a purpose to exclude from the grant, because of *being at the date of definite location*, subject to a "claim," land, which was expressly excepted from the grant because of its character. It is quite unreasonable construction to exclude from the grant under the words "other claims or rights," land expressly excepted regardless of the existence of "claims or rights"; or to assume that congress was legislating on the theory that placer claims would be filed upon land confessedly agricultural.

Congress certainly intended, that if at the date of definite location any tract of land, which *would* otherwise *fall within the grant*, chanced to be subject to a preemption or other *similar* claim it should be lost. The reason of this has been frequently stated by this court; it was not intended that the company should involve a settler in the defense at law of his homestead or preemption, where he had filed a claim *in its nature capable of lawful assertion.*

But no more was it intended that through the prairies of Minnesota and Dakota men could, watching the progress of definite location, take out of the grant agricultural lands, hundreds of miles from any mineral, by covering them with mining claims, and after definite location acquiring them by pre-

emption or purchase from the United States. This could have been done without limit under the rule of the decision below, for there is no limit to the number of mining claims which one person may legally make.

The plain and known purpose of the exception under consideration was to prevent contests of claimants and settlers with the land grant corporation, as to the *bona fides* or validity of existing claims and as to the claimants subsequent compliance with the law. Congress thought it wise to take all such "claimed" land out of the grant, and give the company indemnity. But it is far away from such a policy or purpose to apply such exceptions, *which are in their nature based entirely on the status of the title of the United States, to lands to which, because of their character, the title of the government is absolutely free.*

The purpose of congress is really very clear, notwithstanding the somewhat loose words "other claims or rights." It is not claimed here that at the date of definite location the parties who had filed "claims" had any "*rights*" in this land. Under the laws of the United States no one can acquire any right in agricultural land by making a mineral claim thereto. The words "claims" and "rights" are not synonomous. But the word "claim" as used here is naturally and well construed with reference to the word "rights," so that "claim" shall include those claims only, which are capable under the law of developing into rights. The

word "claims" includes homestead claims which are not otherwise covered than by this word.

Again, it seems plain that the language can apply only to the class of claims, which, *if not existing at the date of definite location cannot be made thereafter;* otherwise why did congress say free from claims or rights "at the time the line of said road is definitely fixed." It has been decided and must, we apprehend, be regarded as now settled that land within the limits and sectional designation of the grant, may *after definite location* be explored for mineral, filed on and appropriated as mineral. But such a mineral filing *after definite location* can be contested by the company on the ground that the land does not contain mineral. There appears no good reason why a mineral filing made *before definite location* cannot be contested on the same ground. The ground of contest in either case is the *character of the land*, not the regularity of the claim. On the other hand if the land is agricultural no claim can be filed or attach to it, as against the grant, after definite location.

The only point congress intended to interdict contest concerning, was the title of the government at the time of definite location. The character of the land, it intended to leave open up to the issuance of patent. It is difficult to see why congress left the character of the land open to contest after definite location, if it intended to make a "claim" as to the character of the land conclu-

sive if asserted before definite location. The act contains no language on which to base so unreasonable a distinction.

But the language of this clause is made abundantly clear when we consider the clause which follows it, and which cannot properly be ignored. "And whenever prior to said time (the definite location) any of said sections or parts of sections shall have been *granted*, *sold*, *reserved*, *occupied by homestead settlers*, *or preempted*, *or otherwise disposed of*, other lands shall be selected by said company in lieu thereof." The words in italics used in this indemnity clause are obviously intended as the equivalent of the similar words in the first clause. The words "other claims or rights" in the first clause are omitted in the second. Yet the two clauses are synonomous for it is plain the second was intended to grant indemnity to the full extent of the losses established under the first.

Clearly *this* indemnity clause did not give indemnity for losses of mineral lands. Mineral lands were not within the grant any more than were even sections and the principle of indemnity is that it covers and applies to lands granted but lost. Indemnity does not obtain for lands not lost because not granted. Moreover, there is an express indemnity for mineral lands within the limits of the grant by special provision later in the section, which we may note was not contained in

the bill which originally passed, but was added in conference.

And we submit that if this land is lost to the grant because of a *mineral claim* the land not being *mineral* there is no indemnity under either clause. This, if true, should be conclusive. It does not come within the specific indemnity for land in fact mineral. No more does it come within the clause above quoted. It was neither *granted, sold, reserved, occupied by homestead settlers, preempted or otherwise disposed of*, when the line of the road was definitely fixed. The indemnity clause clearly interprets the word "claims" in the loss clause, as meaning homestead and perhaps similar claims (should any be created by law) which were of such a nature that they might lawfully attach to the *granted* lands. The words "claims" or "rights" cannot be held to include mineral claims, or any claims except such as the second clause gives indemnity with respect to.

This construction, arrived at by reading the whole section together, is reasonable, gives effect to all the language used by congress, and is moreover in harmony with the settled policy of such legislation from its beginnig.

JOHN C. SPOONER,
C. W. BUNN,
Of Counsel for Plaintiff in Error.

166-620

FILED.
DEC 4 1895
JAMES H. McKENNEY,
CLERK.

166-620

Supreme Court of the United States.

OCTOBER TERM, 1895.

NO. 107.

Northern Pacific Railroad Company,

Plaintiff in Error,

vs.

Junius G. Sanders et al.,

Defendants in Error.

Brief for Defendants in Error.

S. S. BURDETT,
Att'y for Defendants in Error.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1895.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

THE NORTHERN PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

v.

JUNIUS G. SANDERS ET AL.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit.

The action is ejectment, and was brought by the plaintiff in error in the district court of the first judicial district, Territory of Montana (county of Lewis and Clarke).

On motion of the plaintiff, it was transferred to the United States circuit court for the circuit of Montana, where the trial was had.

There was complaint and answer (Rec., p. 5–7) and amended complaint and answer (Rec., p. 13–16) and a demurrer to the said amended answer (Rec., p. 24).

The cause went to trial on the demurrer and there was a judgment thereupon for the defendant (Rec., p. 26; opinion, p. 27).

A rehearing was allowed on motion of plaintiff in error (Rec. p. 39), and the said demurrer was overruled, and judgment entered in favor of defendant for costs (p. 42). Opinion on rehearing, Rec., p. 48.

The plaintiff thereupon took the case by writ of error to the Circuit Court of Appeals, where the judgment below was in all things affirmed. (Rec., p. 69; opinion, p. 60.)

The cause was then brought to this court by writ of error, and upon assignments of error, seven in number. (Rec., p. 70.)

Assignments Nos. I and IV contain the principal contention on which plaintiff in error stands. The complaint preferred against the judgment by these assignments is that it was held that the certain mineral locations, claims, and applications for patent mentioned and recited therein which were filed and pending at the time the line of the road of the plaintiff in error was definitely fixed opposite thereto, excluded the tracts covered thereby from the description of public lands to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights.

The remaining assignments are, in the main, statements of the grounds on which the plaintiff in error holds the said assignments Nos. I and IV to be well taken and sufficient.

Those grounds are that the said mineral locations ought to have been held null and void and of no effect whatever, because upon the trial of the applications of the locators for a patent it was found and held by the

local officers that the lands located were not mineral lands in the sense of the mining laws of the United States. (Assignments Nos. II, III, and IV, Record, pp. 70, 71.)

The essential facts and proceedings set out in the amended answer, the sufficiency of which is called in question by the demurrer, are—

(*a*) That the lands in controversy are parts of an odd-numbered section within the place limits of the grant to the plaintiff company made by the act approved July 2, 1864. (Stats. at Large, Vol. 13, p. 365.)

(*b*) That at a time subsequent to the location of the line of general route (February 21, 1872), but prior to the date of the definite location of the line (July 6, 1882), they were occupied and located in due form as placer lands under the mineral land laws of the United States.

(*c*) That proceedings in conformity with law and regulations were instituted by the mineral claimants and locators in the proper local land office of the United States to obtain the patent of the United States therefor as mineral lands, and that these proceedings were had and pending before and at the date of definite location of the line of the Northern Pacific R.R. Co., and remained pending for some time thereafter. That pending said patent proceedings the plaintiff company filed a protest in said local land office against the issuing of a patent to the said locators, the ground of protest being that the said lands were not mineral in the sense of the exception in plaintiff's grant, but that said locators and applicants continued to maintain, and were so maintaining at and after the date of definite location, that the said located tracts were commercially valuable for the gold therein contained, and were mineral land within the definition of that phrase as contained in the act granting lands to said plaintiff.

(*d*) It is confessed "that said premises did not contain gold or other precious metals in paying quantities or in such quantity as to make the same, or any thereof, commercially valuable therefor" (Record, p. 17).

The contention of the defendants in error is that the claim and proceedings thus initiated, asserted, and pending brought the tracts covered by them within the class of lands excepted out of the grant to the plaintiff company, and upon their rejection left them in the category of public lands of the United States subject to disposal under the general settlement laws, the particular provisions relied upon being those clauses of the third section of the act approved July 2, 1864, which except out of the operation of the grant lands reserved or otherwise appropriated, or to which claims or rights had attached at the date of the definite location of the line of road opposite thereto, and that it follows that upon the rejection of the mineral applications the lands before covered by them became subject to their homestead settlement and final appropriation.

The defendants in error here are not the same persons as were the mineral applicants nor in anywise connected with them as is erroneously presumed in the brief of plaintiff in error.

The contention of the plaintiff in error is that lands in odd-numbered sections within the primary limits of the grant, which before and at the date of definite location were possessed, located, and filed upon for patent in the proper United States land office under the claim that they were public mineral lands, nevertheless inure to the company if, upon the trial incident to the patent proceedings, it is determined that they have not been shown to be of the mineral class in the sense of containing deposits commercially valuable, or capable of profitable working.

The sections of the act approved July 2, 1864, *supra*, which are material to this controversy are as follows:

"SEC. 3. *And be it further enacted*, That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: *Provided*, That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided, further*, That the railroad company receiving the previous grant of land may assign their interest to said 'Northern Pacific Railroad Company,' or may consolidate, confederate, and associate with said company upon the terms named in the first sec-

tion of this act: *Provided, further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road may be selected as above provided: *And provided, further*, That the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal: *And provided, further*, That no money shall be drawn from the Treasury of the United States to aid in the construction of the said 'Northern Pacific Railroad.'"

"SEC. 6. *And be it further enacted*, That the President of the United States shall cause the lands to be surveyed, for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre, when offered for sale."

ARGUMENT.

The grant to the company is of "public land." In Bardon *v.* Northern Pac. R.R. Co. (145 U. S. 535, 538) the court said, "The grant is of alternate sections of public land, and by public land, as it has been long settled, is meant such land as is open to sale or other disposition under general laws. All land, to which any claims or

rights of others have attached, does not fall within the designation of public land." At page 543 it is further said, "the rule of construction adopted, that, in the absence of any express provision indicating otherwise, a grant of public lands only applies to lands which are at the time free from existing claims, is better and safer, both to the Government and to private parties, than the rule which would pass the property, subject to the liens and claims of others. The latter construction would open a wide field of litigation between the grantees and third parties."

The third section of the act of July 2, 1864, contains the grant, defines its locus, extent and possible quantity, declares its exceptions, and fixes a day certain upon which then existing conditions shall settle whether any given tract is within the grant or falls within the exceptions. By its general frame and necessary implications the question of whether grant or exception shall prevail as to any tract within the limits is, so far as the administration of the grant is concerned, left primarily to the tribunal of the Land Department.

In every such controversy it is material to fix the time when the jurisdiction of the Land Department over the disposal of tracts geographically embraced by the terms of the grant involved attaches and ceases. The legislative rule in such grants as to tracts clearly public and non-mineral—that is, tracts to which no claim is asserted by a citizen and no reservation has been ordered by the United States—is that such jurisdiction ceases when definite location is duly made.

Thereafter, as to those tracts, a duty may remain to be performed, but it is one purely ministerial and to the end of evidencing by certificate or patent the title which became vested by the definite location of the line. This is

true because by operation of law all such tracts became, *eo instanti*, segregated from the body of the public domain by the fact of such definite location.

But as to tracts which, though geographically embraced, may, by some provision in favor of the United States, or of some claimant under the United States be excepted out of the grant, the conditions are different.

As to them, there must, in the nature of things, be trial and judgment. The tribunal vested with primary jurisdiction to that end is the Land Department. The jurisdiction thus vested is not ministerial only but, as involving discretion and judgment, is *quasi* judicial.

The records of that Department will show, and they alone, whether at a given period a claim such as must be evidenced by proceedings in the local land office—such as a homestead, timber culture, desert land claim, or mineral application—has been propounded and remains intact; and within that tribunal must be tried the sufficiency of settlement rights, as under the pre-emption laws, or rights to mineral lands evidenced by location and improvement only, which on a given day—as, for instance, the date of definite location—had not been formally presented and applied for, but which were thereafter presented in due time and manner. These, and all claims falling within the exceptions to the grant, became by their presence of record, or by the performance of acts of settlement, improvement, or development of the land itself, pending cases which must proceed to judgment, as between the claimant and the United States, before any question could arise as to whether, as a result of the finding, the tract inured to the grant.

A provision of the act of July 2, 1864, among others, is that no lands pass to the company to which, at date of definite location, "claims or rights" had attached.

We agree that the "claims or rights" here referred to must be such as the Land Department may take jurisdiction of and is authorized to consider and determine under some provision of the public land laws; and we insist that, given such a case or claim duly existing at the date of the definite location of a line of road, the tract so claimed or affected is not of the body of the public lands subject to disposal either under the grant or under the general land laws, but stands segregated from the mass of the public domain and remains in that condition until the pending case or claim shall be disposed of by due course or procedure; and that in case of the disallowance of the claim the land freed from it takes again the status of public lands as of the date of such disallowance and becomes from that time subject to appropriation under proceedings *then* lawfully operative and under no other.

"Jurisdiction of the subject-matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power. It is not confined to cases in which the particular facts constitute a good cause of action, but it includes every issue within the scope of the general power vested in the court by the law of its organization." * * *

Foltz *v.* St. Louis & S. F. Ry. Co., 60 Fed. Rep. 316–319.

Jurisdiction is the power to hear and determine. The test of jurisdiction is whether the tribunal has power to enter upon the inquiry, and not whether its conclusion in the course of it is right or wrong.

Cornett *v.* Williams, 20 Wall. 226–249.

Colton *v.* Beardsley, 38 Barb. 30, 51, 52.

The allegations of the answer to the amended complaint

to which the demurrer of plaintiff in error is addressed set up the facts that, at a time anterior to the definite location of the road, though subsequent to the date of the grant and of the designation of the general line of route, a mining claim had attached to the land. That the claim so attaching was in all respects regular and valid in form, and had progressed so far toward completion as that the proofs required by law had been tendered and filed in the local land office, and that such was the state of the case of the mineral claimants at and subsequent to the time when the map of definite location was filed by the railroad company.

The presence and pendency of these claims in the proper land office, we insist, lawfully invoked the jurisdiction, gave the power, and made it the duty of the tribunal to which they were addressed to enter upon inquiry as to their sufficiency to warrant the issuance of patents for the tracts claimed as being of the mineral lands of the United States. If this is so, a "claim" had attached and remained pending when definite location took place, and the tracts so claimed were thereby excepted from the operation of the grant.

The fact that there were such claims so presented and so pending, and in process of trial, is admitted by the demurrer, but the sufficiency of the fact to constitute an exception from the grant is denied on several grounds.

Stated in general, the position of the plaintiff in error seems to be that mineral claims complete in form, and presented in due time and manner to the proper tribunal, and which would have lawfully ripened into a patent had the claimants sustained their contention that the land was commercially valuable as mining ground, must nevertheless be considered as no claim at all, and as never having, in fact, attached to the land in any sense of the act of

1864, if the finding is that the land is not commercially valuable for its minerals.

The special grounds of appellant's contention are:

1*st*. That the grant reserves from its operation two divisible classes of lands, namely, the mineral lands, which are excluded on account of the character of the soil, regardless of the state of the title, and other lands exempted by reason of the condition of the title at the date of definite location, the deduction being that since mineral lands are excluded under a clause of the act covering them as a class, no provision relating to the other class should be held to embrace them, because, it is urged, to do so would subject the act to the criticism of uselessly providing two grounds of exception applicable to the same lands.

2*d*. That claims to mineral lands cannot be supposed to have been within the contemplation of Congress in the making of this law, because at its date there was no act of Congress or any law under which a right or claim could be initiated to mineral lands.

3*d*. That the mineral claims here involved had their inception subsequently to the delineation of the line of general route, and that under the operation of the sixth section of the act such delineation operated as a withdrawal of all lands intended to be granted from liability to settlement, appropriation, or claim of any kind whatsoever save by the grantee company.

I.

Considering these contentions in their order, we remark of the first that it seems to proceed on the assumption that the provision excluding lands of a class (mineral lands) would prove to be or would become in some way

self-operative, and is oblivious of the fact that down to the passage of the act approved February 26, 1895 (28 Stats. 683), there was no agency by which the mineral lands of the public domain could be officially identified and separated from the agricultural lands, save through the attachment to them of the claims of explorers and locators, the pursuit of whose claims served to bring each located tract into the forum of the land office for a determination, among other things, of its value as mineral land. But the criticism is upon the mere method of the lawmakers; their substantive purpose would be defeated by it.

The act approved July 26, 1866 (14 Stats. 251), was in full force when and before any map of general route affecting these lands was made or filed, and whilst, therefore, the lands afterwards identified by the definite location of the line were subject to the laws then in existence affecting the public domain, and to any further condition for the public weal that Congress might see fit to attach to them.

The said act of 1866, which was the first law regulating the disposal of the mineral lands of the public domain, did attach to them the right of "exploration and occupation" by citizens of the United States seeking to test their mineral value with a view to their purchase as such.

In *Barden* v. *Northern Pacific R.R. Co.* (154 U. S. 288–320) the court said, in construing this very act of 1864: "The privilege of exploring for mineral lands was in full force at the time of the location of the definite line of road, and was a right reserved and excepted out of the grant at that time." If the occasion had called for it, the holding would undoubtedly have been that the same privilege was in full force and was a right excepted out of any reservation or withdrawal made or implied by the sixth section of the act.

"The privilege of exploring for mineral lands" when put in execution is, in itself, a claim of right under a law of the United States and attaches therefore as a necessary incident to that clause of the act of 1864 which exempts the mineral lands from the grant made, and it furnishes a proper subject for the operation of the clause of exclusion which deals with "claims" to the public lands.

Erhardt *v.* Boaro, 113 U. S. 527.

Whether or not a tract claimed for its minerals—that is, located as mineral land—is valuable as such is an issue of fact made by the law and the regulations thereunder in every case presented for patent. If the patent proceedings are *ex parte*, the proofs must show to the satisfaction of the register and receiver that the tract claimed contains a deposit of valuable minerals. If a third person intervenes, claiming some interest in the lands as a proposing settler under the general laws, and protesting their mineral quality, a formal hearing is held and testimony taken.

The character of granted land is for the determination of the officers of the Land Department.

Barden *v.* N. P. Railway, *supra*, p. 320.

That was the course taken in this very controversy. It was in process of trial before the date of definite location and continued undetermined for some time thereafter, and during all the time the Land Office records evidenced the fact of the pendency of this proceeding.

Since it cannot be denied that the existence or nonexistence of valuable mineral deposits in lands claimed for their minerals is in every case a triable fact in the Land Department, it must follow, as we have before said, that the right to have such a trial and a determination thereon is a necessary incident of the estate which the

United States reserved to itself in the act of 1864, when the mineral lands were excepted. If this is so, the title to lands concerning which such a controversy is present and undetermined must remain in the United States pending the decision of the controversy.

Any contrary view must stand on the theory that though definite location is decisive of the course of the title as to all other cases of exception, leaving the title in the custody in which such location found it, yet as to the excepted mineral lands the rule is such that a subsequent rejection of a pending mineral location casts the title upon the grant claimant. Such a view, however, presupposes a condition of things under which the grantee in fact retains some interest under the grant in the tract embraced by the rejected mineral claim, notwithstanding its existence as a claim at date of definite location; and one which would entitle said grantee to be heard on the question of its validity. But among those things which have been so definitely settled by the repeated decisions of this court as to be no longer debatable ground, is the principle that the grantees of the public lands who occupy the position of beneficial adventurers will not be heard as litigants, nor awarded the position of interested parties, where a question arises, under the exceptions of the grant, upon a claim preferred and in existence when the promises of the granting act became merged into a severable estate by the act of definite location.

Pacific Railway Company *v.* Dunmeyer, 113 U. S. 629.

Hastings & Dakota Railroad *v.* Whitney, 132 *id.* 132.

Whitney *v.* Taylor, 158 U. S. 85.

If it be urged that these decisions and the many other adjudications of like import by this court were rendered

in causes where the lands were found to be exempted by reason of the condition of the title, and not by reason of the character of the land, the answer is that in Barden *v.* Northern Pacific Railroad (154 U. S. 288–319) the court, as if anticipating such possible objection, said:

"As justly observed by counsel for the defendant in their very able brief, 'the reservation in the grant of mineral lands was intended to keep them under Government control for the public good, in the development of the mineral resources of the country, and the benefit and protection of the miner and explorer, instead of compelling him to litigate or capitulate with a stupendous corporation, and ultimately succumb to such terms, subject to such conditions and amenable to such servitudes, as it might see proper to impose. The Government has exhibited its beneficence in reference to its mineral lands, as it has in the disposition of its agricultural lands, where the claims and rights of the settlers are fully protected. The privilege of exploring for mineral lands was in full force at the time of the location of the definite line of the road, and was a right reserved and excepted out of the grant at that time.'"

It may be repeated here that the position of the plaintiff in error on this point of the controversy, if maintainable, tends to minimize and render barren of results the exception of the mineral lands contained in the grant. If it be true that the company retains a reversionary interest in lands located as mineral, as indicated by its contention, it may, at any time, by its own acknowledged agencies, or by the incitement of others, bring the locator into the forum of the local land office for a trial of the question of the commercial value of the vein or deposit upon which he is expending his time and money.

The explorers and locators of the mineral lands are often tempted to their work by but slight surface indications, and

often with no other assurance of success than is furnished by apparent geological conditions or the nearness of valuable finds in adjacent tracts, coupled with the presence of but slight leads of the precious metals. They may, and, as we know from the history of mining operations, often do, pursue these slender indications for years before they reach a paying deposit, or become satisfied that their efforts are in vain. The mineral laws have wisely safeguarded these operations by providing that the license to explore and locate shall continue to run so long as the good faith of the claimant toward the United States is evidenced by specified annual expenditures (Rev. Stats., sec. 2324). But if the act of 1864 is to be construed as changing all this by letting in a third party in interest, who may hang on the miner's skirts and call him in question at its pleasure, and at any point of his progress, or at all, it is easy to see that the vast and costly service which the explorers perform for the United States in this behalf will be rendered elsewhere than within the limits of railroad grants, thus practically annulling, or at least preventing the enforcement of, the clause of the grants excluding mineral lands from their operation.

There is but one theory of interpretation under which this contention of the plaintiff company can be sustained without the overthrow of the settled rulings of this court as to the effect of definite location, and that is to hold that the exception of mineral lands from the grant must be administered as though it read, lands *known* to be mineral at the date of the definite location of the line of route. This was the construction contended for by the company at the date when this action was brought (see paragraphs VI and IX of amended complaint, Rec., pp 14 and 15), and was the issue maintained in this court in the company's behalf in *Barden* v. *Northern Pacific Rail-*

road, supra. It received its quietus in that case, the court saying, among other things: "To suppose that Congress intended any such limitation would be to impute to it a desire that its exclusion of minerals from the grant should be defeated, which it is impossible to admit" (p. 318.); and, again, "To incorporate the term 'known' into the act and add it to the description of the mineral excepted would also contravene a settled rule in the construction of grants like the one before us, that nothing will pass to the grantee by implication or inference, unless essential to the use and enjoyment of the thing granted, and that exceptions intended for the benefit of the public are to be maintained and liberally construed" (p. 319).

If any title at all to the tracts in controversy passed to the company by virtue of the terms used in the granting clause of the act of 1864 upon the definite location of the line of route, it was a legal title as distinguished from an equitable or inchoate interest. *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241–247. But such a title did not and could not pass in this case if at the very moment of definite location the tracts involved were *sub judice*, under a process then running for the determination of the rights thereto of third persons claiming them by virtue of compliance with the mineral laws.

But the existence of mining claims upon the public lands was known and notorious and part of the public history long before 1864. The stream of wealth flowing from them gave the impetus to settlement in the far West which suggested and made necessary the building of the Northern and other Pacific railroads. These claims had been recognized as property and placed under the protection of the laws of the States and Territories where they existed for many years before the grant was made to the plaintiff company.

Sparrow v. *Strong* (3 Wall., pp. 97, 105) presented the question of whether a mining claim on public lands in the State of Nevada was of money value within the meaning of the statute so as to give jurisdiction to this court. It was decided in the supreme court of Nevada in 1863, and in this court at the December term 1865. The Chief Justice, in delivering the opinion, referring to the Territorial laws which recognized the validity of the rules, regulations, and customs of the mining districts, said: "And we cannot shut our eyes to the public history, which informs us that under this legislation, and not only without interference by the National Government, but under its implied sanction, vast mining interests have grown up, employing many millions of capital, and contributing largely to the prosperity and improvement of the whole country." That there might be no impediment to the attachment of mining claims or to their defence because of their location on the public lands, Congress passed the act of February 27, 1865 (13 Stat. 441), declaring that the fact that the paramount title to the land on which such mines are is in the United States should not affect any possessory action brought for the recovery of any mining title, or for damages to such title; and the act approved May 5, 1866 (14 Stat. 43, sec. 2), expressly provided that possessory rights to mining claims should remain "as valid subsisting mining claims."

It would have been a strange thing if the Congress which passed the act of 1864, whilst remembering and providing for the protection of the *claim* of proposing pre-emptors and homesteaders, had forgotten to do like justice to the mineral claimants.

The subject was in mind, for mineral lands were excepted from the grant; so were pre-empted lands—that is, lands to which the pre-emptor made good his claim,

but so also were lands which at date of definite location were *claimed* under pre-emption proceedings which, however, never ripened into title. Why should the claim of the one be remembered and that of the other ignored? The words of the third section, "claims or rights," are as apt when made to refer to a mining claim as to any other, and the public history and known exigencies of the times warrant the contention that they were inserted in view of their existence, and in view of the plain duty toward the United States and the miner of giving them protection. The need of protection to the individual as against the great corporation was as great for the miner as for the pre-emptor, and the interest of the United States to preserve to itself, free from interference by the company, sole jurisdiction in the matter of claims to mineral lands was palpably important. It has pleased Congress to give to claims and claimants under the mining laws peculiar and exceptional favor. As to other forms of acquiring public lands, the claimant or applicant must within a specified period merge his claim in a title in fee. He must prove his right to a patent and pay for the land or be subject to forfeiture. This was true under the pre-emption, homestead, timber-culture, and desert-land laws. But the mineral claimant may hold his selected tract as a claim indefinitely, on the sole condition of making a small annual expenditure. He may hold this incipient right forever. No third person can successfully assail him. The courts will protect him, and the Land Department becomes the guardian of his rights. This is not mere favor; it is recognition of the fact that exploration may not lead to assured results for a long period of time, and that it is to the interest of the United States to extend its protection to any citizen who is willing to take the risks and expend the money involved in such work.

II.

The answer to the second special ground of exception is that, whatever may have been contemplated by the Congress which passed the act of July 2, 1864, the Congress of 1866, before any act whatever had been done by the Northern Pacific Company to even delineate the general route of its proposed road, and whilst, therefore, every parcel which might become a part of the grant remained public land, did, by the act approved July 26 of that year, attach to these then public lands the rights and servitudes in favor of explorers and locators therein declared, and that subsequently, by additional legislation, these rights were confirmed and enlarged. Act of July 9, 1870, 16 Stats. 319, and May 10, 1872, 17 Stats. 91.

That this was within the power of Congress is clear.

The right to alter, amend, or repeal the act under which this grant was made was retained by section 20 thereof. (13 Stats., p. 372). Independently of that clause of the act of 1864, until the lands were earned, and other acts demanded of the company by law had been done, no such rights had become vested in the company as would prevent Congress from passing further remedial provisions affecting the lands of the grant.

Northern Pacific R.R. Co. *v.* Trail County, 115 U. S. 601–9.

The joint resolution approved January 30, 1865, declaring "that no act passed at the first session of the Thirty-eighth Congress * * * shall be so construed as to embrace mineral lands, etc.," * * * (13 Stat. 567), is to be deemed an amendment of the original act of 1864, "and as operative as if originally incorporated therein."

Barden *v.* Northern Pacific R.R. Co., *supra.*

There is no ground for holding that the act of 1864 contained, expressly or impliedly, a contract or assurance on the part of the United States that no further legislation affecting the disposal of the public lands should be enacted pending the day when it should suit the convenience of the company to segregate its estate by the definite location of its line; nor is it provided that the claims, which by section 3 were to serve as exceptions, must be predicated upon some then existing statute. It is in the light of existing law and in the light of competent and possible changes growing out of the necessities and exigencies of the times that all law is framed. Since the act of 1864 not only the mining laws of 1866, 1870 and 1872, but the timber-culture laws, the several acts for the entry of timber and stone lands, and the desert-land laws have been passed.

Congress has not felt that it was in any wise handicapped, nor that there was any soil of the United States so sacred that it could not protect applicants for it. But the act of July 2, 1864, itself forecloses all question on the subject. The rights of the company were made to attach on definite location. Until that fact was accomplished the United States left to itself a free hand to reserve to itself lands needed for public purposes, to forward its favorite policies in disposing of the public lands by new legislation, and to protect claimants under legislation new or old.

III.

As to the third contention.

The company took its title under the provisions of the 3d section of the act. The law of its grant followed the beaten path of former land-grant legislation in the incident that no title to ascertained or particular tracts passed

to the company until definite location. If nothing further affecting the granted lands had been said in the act, the right under the public land laws to sell or otherwise dispose of such of them as would, on definite location, become the property of the company would have remained in the Government unimpaired until the act of definite location had been performed and was duly evidenced.

Missouri, etc., Ry. Co. *v.* Kan. Pac. Ry. Co., 97 U. S. 491–98.

But there is found in the sixth section provision which it is insisted further incumbers the title of the United States in the company's favor, and in such measure and manner that the United States are estopped at a period anterior to definite location from making any final disposal of the lands contemplated by the grant, or of permitting the attachment thereto of initial or settlement rights.

The provision relied upon to that end is the direction given to the President to cause the lands to be surveyed along the entire line of the road "after the general route shall be fixed," and the declaration following this direction that "the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided in this act."

There is intimation on behalf of plaintiff in error that this provision in some sense made the designation of the general route operative to vest, or at least to initiate, title in the company. But, however that may be, the strenuous contention is made that said section six effectively withdraws all of the odd sections from market, so that, from that period, they stood as securely dedicated to the use of the company, and as effectively beyond the reach of

the public desiring to acquire them under the public land laws, as becomes the case when definite location has taken place.

The far-reaching nature of this contention will be better understood when it is perceived that the just, clear, and usual provision of section 3, which holds the company entitled to only those lands which were clear at definite location, is abrogated and pushed back to the period of selecting the general route, and that, too, upon the strength of a paragraph whose general subject and motive is a different thing, and which is silent as to the manner of evidencing the very central and momentous fact to be accomplished by it.

The many cases decided by this court in which it has been pointed out that the provision of section 3 of this act (which is common to most of the granting acts preceding and following it) is one in aid of the public, and intended to avoid, as far as possible, obstruction to the normal operation of the land system up to the very period of definite location, illustrate the very importance of the question involved.

The theory of section 3 and of kindred enactments is that the date when the beneficiary company may entitle itself to take title is within its own hands and at its own option, requiring only the fixing of its permanent line of route, and that until it did take the title by that means the operation of the public land laws should not be impeded. As we have said, the claim advanced in this case by the plaintiff company is that, notwithstanding section 3, which is the "fundamental clause" of the act, the public land laws did cease to operate within its territory at a different and earlier date.

Without at this point discussing the question as to whether section 6 is to be construed as intended to work

a withdrawal at all, and conceding, for the sake of argument, that authority for a withdrawal of lands to some extent was intended to be declared as incident to the selection of a line of general route, and that to that extent the provisions of section 3 are modified and overridden, the question arises, as to what is the extent or what is the measure of the withdrawal so declared? It is settled doctrine that privileges to adventurers at the expense of the public are not to be enlarged by construction or otherwise, but that interpretation must run in favor of the public.

Charles River Bridge *v.* Warren Bridge, 11 Pet. 420–544.

Leavenworth Railroad Co. *v.* United States, 92 U. S. 733.

It is principally to be borne in mind that if a general withdrawal is to be argued out of section 6 at all, it must be predicated of the overthrow of an affirmative declaration of policy, old and well established, and of the clear and undoubted meaning of the preceding section 3 of the same law.

The language relied on is that contained in the sentence of section 6, which reads, "and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed."

The withdrawal or reservation, if one was intended, can go no further than is embraced in the words *sale*, *entry*, or *pre-emption;* these three things, and no other, are forbidden. Every other right held by the public at large under the general land laws, and any other form of disposal or appropriation than these three, remained to Congress, and was terminable only by the act of definite location.

Sale, entry, and pre-emption are words of known im-

port in the public land system, and have received judicial interpretation.

United States *v.* Dunmeyer, 113 U. S. 629.

In the Dunmeyer case, *supra*, which called for the interpretation of the acts of July 1, 1862 (12 Stat. 489), July 2, 1864 (13 Stat. 356), and July 3, 1866 (14 Stat. 79), in which were inserted provisions for the filing of a map of general route and of definite location, it was provided in the earlier act (1862) that upon filing a map of general route within a time limited the lands within specified limits should be withdrawn from "*pre-emption, private entry*, and *sale*." The specified map was not filed within the time limited, and by the act of 1866 the company was allowed six months longer, and no more, to file it. But this act (1866) declared that the lands should be reserved from "sale," and not, as in the previous act, from "pre-emption, private entry, and sale." The court held that, "in the terminology of the laws concerning the disposition of the public lands," each of the words "pre-emption, private entry, and sale" has a distinct and well-known meaning, that neither one of the words included the other, and that a homestead entry would not be forbidden by a statute which withdrew lands from *sale* only. The reasoning upon which this conclusion is based is equally applicable to, and forbids, the contention that the words "pre-emption, private entry, and sale" include the processes for obtaining title to mineral lands, which are, first, the right of entry thereon for prospecting or exploring purposes; second, location under the State, Territorial, or local rules of the miners of the district; and, third, entry at the local land office, and patent.

That no such purpose was consciously in the mind of Congress must follow from the fact that when the enu-

merations of section 6 were made (July 2, 1864) there was no law in existence for the acquisition of final title to the mineral lands. Prophecy has no place in the law of construction by intendment. It will be seen that if the contention of the plaintiff in error on this point is good at all, it must go to the extent of convincing the court that the provisions of section 6 rendered exploration unlawful, for that is the initiatory step toward fixing upon the tract explored the title and right of possession which flows from the act of location; but we have seen that this court has declared that such right did attach to the lands of this very grant. (*Barden* v. *Northern Pacific Railroad*, *supra*.)

By the said sixth section of the act the lands which may be reserved from "sale, entry, or pre-emption" are expressly designated to be "the odd sections hereby granted."

This is clearly a limitation on the withdrawal. What is the residuum of odd-numbered sections within the geographical limits of the grant which are, nevertheless, odd sections *not* "hereby granted," and hence not within the reservations of the section, if any there be?

The reading of the third or granting section must determine that question, for within its lines are to be found the lands withheld as well as those given.

Those withheld are, *first*, such as at the date of definite location were not "public lands," as that term is understood in the land laws—that is, lands to which the United States had not the full title; *second*, reserved lands; *third*, those sold; *fourth*, those granted; *fifth*, or otherwise appropriated; *sixth*, or which were not free from pre-emption; *seventh*, or other claims; *eighth*, or rights; *ninth*, mineral lands.

It is not controverted that the lands which are the sub-

ject of this case were claimed as mineral lands at the date of definite location, and had been reduced to possession by the claimants and located as such. This brought them within the description of the fifth of the above specifications, lands "otherwise appropriated," as well as within the seventh, and therefore not lands to which the United States had full title.

In *Cameron* v. *United States* (148 U. S. 301) this court, citing Wright *v.* Matteson (18 How. 50, 56), said: "The courts have concurred, it is believed, without an exception, in defining 'color of title' to be that which in appearance is title but which in reality is no title. They have equally concurred in attaching no exclusive or peculiar character or importance to the ground of the invalidity of an apparent or colorable title; the inquiry with them has been whether there was an apparent or colorable title under which an entry or a claim has been made in good faith;" and thereupon held that lands covered by such a claim were not public lands of the United States within the meaning of that term as used in the acts of Congress respecting the disposition of public lands, citing—

Wilcox *v.* Jackson, 13 Pet. 498.

Leavenworth, &c., Railway *v.* United States, 92 U. S. 733.

Newhall *v.* Sanger, 92 U. S. 761.

The rule deduced is that it is not the ultimate validity of a claim of title *but the fact of its existence* which determines whether or not its effect is to take a given tract out of the category of public lands.

The contest of a defeated litigant is not unlawful. There is no authority to insert the word "lawful" or "valid" before the word "claim," or to hold that these words, or either of them, must be supposed before "loca-

tion," when that form of claim or title is alleged in bar of a contention that lands are public in character, in order to change the meaning of a statute and enlarge a grant.

Newhall *v.* Sanger, *supra.*

Whitney *v.* Taylor, *supra.*

But, as we have seen, the claim of title here interposed is not merely colorable, nor under the issue raised by the demurrer is the good faith or apparent validity of the mineral locations brought into question.

Section 2322 of the Revised Statutes confers upon the locator of a mining claim "the exclusive right of possession and enjoyment" of the located tract. This is in the nature of a legislative grant of an interest in the land. The Government thereafter holds the title in trust for the locator.

Noyes *v.* Mantle, 127 U. S. 348.

A mining claim is real estate, transferable only by operation of law or an instrument of writing.

Milton *v.* Lambard, 51 Cal. 258.

Galler *v.* Fell, 30 Cal. 481.

Moore *v.* Hammerslay, 42 Pac. Rep. 804.

In *Forbes* v. *Gracey* (94 U. S. 762) it is decided that "the possessory right to explore and work the mine is property in the miner, and property of great value."

In *Jennison* v. *Kirk* (98 U. S. 453) it is said, after relating the history of mining from 1848 to 1866, and stating the fact that during that period mining rights had rested on local customs, local laws, discovery, and regulations adopted by the miners themselves, that "In no provision of the act (1866) was any intention manifested to interfere with the possessory rights previously acquired, or which might be afterwards acquired; the inten-

tion expressed was to secure them by a patent from the Government."

The motive of the law in securing to a locator or his assigns title to the tract covered by the location, and putting it in the power of the claimant to keep that title alive by an annual expenditure of money upon the claim, is to protect him, whilst engaged on his own behalf and on the behalf of the United States, in testing the question of the value of the deposit. If he succeeds for himself, he succeeds for the United States, by developing its mining resources, and aiding the treasury by enhancing the price of the lands. There is no period fixed by the law within which the possessory title by location must be perfected by patent or be abandoned.

The laws of the United States do not even restrict the period within which exploration with a view to ascertaining whether the tract contains mineral at all or such promise of mineral deposits as to justify location shall be completed. There are local or State regulations on that subject.

In *Erhardt* v. *Boaro* (113 U. S. 527) this court said (p. 535): "In all legislation, whether of Congress or of a State or Territory, and by all mining regulations and rules, discovery and appropriation are recognized as the sources of title to mining claims, and development by working as the condition of continued ownership until a patent is obtained."

The learned circuit judge before whom this case was first heard held, and maintained his position with great force, that section 6 of the act of 1864 is not to be construed as intended to work a withdrawal of lands as the result of, or following upon, the delineation upon the ground of the line of general route.

For the reasons and upon the authorities we have

already presented, we do not consider that the maintenance of this proposition is at all material to the defendant's case, for, as we have endeavored to show, if the section is to be considered as declaring a reservation, its scope in that behalf is so limited and restricted as not to embrace claims of the class involved in the case at bar. We nevertheless contend, as held by the learned judge, that there must be enlargement by intendment of both the terms and general purview of the section as it is written in order to work the benefits and added privileges to the company and against the public which follow from any holding that the section took the lands along the line of general route out of the operation of the most beneficent of the public land laws.

As remarked by the learned circuit judge (Record, p. 30 *et seq.*), it cannot be denied that in Buttz *v.* Railroad Co. (119 U. S. 55) and Denny *v.* Dodson (32 Fed. Rep. 899) there is language which supports plaintiff's view; but in the first case, at least, the language was not necessary to the decision at issue. It does not seem to us that there was any demand for a construction of section 6 of plaintiff's grant in the case of Buttz *v.* Railroad Co. If this be true, the construction given to it is not binding in this case, and we venture the suggestion, with great deference, that the rule applies, expressed by Chief Justice Marshall in Cohen *v.* Virginia (6 Wheat. 399), that "It is a maxim, not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."

Section 6 of the act of 1864 has two principal and

necessary purposes in view which are not elsewhere provided for in the act. These are the motives of the section, and whatever else is contained is incident to them.

First. It is directed that the public surveys be extended over the lands which were within the contemplation of the grant "as fast as may be required by the construction of said railroad," and, that the land department might have some guide to the territory to be covered by them, there was authority given to the company—inferentially rather than directly—to adopt a line of general route.

Second. Since, upon the completion of such surveys, the lands remaining to the United States, viz., the even-numbered sections and the excepted tracts in the odd-numbered sections, would become identified and segregated, as well as the odd-numbered sections granted, and would thus become capable of selection for settlement and purchase under existing law, and, unless other provision was made, at the minimum price of $1.25 per acre, to meet that situation it was directed that the act of 1841 granting pre-emption rights, and the acts amendatory thereof, and the act of 1862 to secure homesteads to actual settlers on the public domain should be "extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company." And as to said reserved alternate sections the minimum price was fixed at $2.50 per acre when offered for sale.

Every paragraph and clause of the section but one is undeniably addressed to, and exhausted in the effectuation of, these two clear, reasonable, and necessary designs of the law. The one clause upon which contention is raised is that which reads, "*and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided in this act.*"

The plaintiff in error insists that this clause evidences and contains a third positive and independent provision of law, whereby the delineation of the general route was intended to work the reservation and withdrawal of every tract of land along its course, then free from claim, from the operation of the public land laws then or thereafter to be enacted.

If this contention is tenable, it becomes so only by an enlargement, through construction, of the phrase on which it is founded and of the section in which it occurs, and this, notwithstanding enlargement in aid of a grant and against the public interest, is never to be permitted save when the expression of the legislative will and intent is clear in its command. If such was its will, it would seem certain that Congress would have used language to that end clear in import and certain in its terms. Instead of this, there is not even direction given for the making or filing of a map of the general route; no place of deposit or officer to receive it is designated; no duty is laid upon any one in connection with such general route save in the matter of surveying the lands along it as fast as might be required by the construction of the road. The apt and every-day words "reserved" and "withdrawn" nowhere appear, and, to crown all, the phrase or words upon which any withdrawal whatever is predicated are in connection with, and depend for efficacy upon, the words "the odd sections hereby granted," which naturally and inevitably carry us back, for the full understanding and application of their purport, to the third or granting section, and to the requisite there laid down for changing the floating right to quantity into sections granted, which is not to happen on the delineation of the general line of route, but on the fixing of the line of road by definite location and filing a plat thereof in the office of the Commissioner of the General Land Office.

It was eight years after the grant was made (1864) before the general route was indicated (1872), and it was ten years more (1882) before the definite location was settled and evidenced. Did Congress wittingly enact that the normal operation of the settlement laws should be suspended for a decade, and invite the company to become laggard in the performance of the duty of definitely fixing its line and building its road, by extending to it such a vast favor of security against the home-seeker and the city builder? Surely if this had been intended it would have been said with clearness, and if for no other reason, that the public might be protected against the hazard which otherwise would follow from entering the territory with the view to acquisition anywhere within the vast domain of the grant.

The subject was not a new one with Congress; it had traversed the ground. The first proviso to the 7th section of the act approved July 1, 1862 (12 Stats. 493, Union Pacific act), had expressly provided for doing the things which it is claimed are, by implication, within the sixth section of the act of 1864. Let it be noted that by the said proviso a period of two years was fixed within which the general route must be designated; that a map of the same was to be filed in the Department of the Interior, whereupon it was directed that the Secretary should cause the land within fifteen miles of said designated route to be withdrawn from pre-emption, private entry, and sale; and when any portion of said route should be finally located, the Secretary of the Interior was to cause the said granted lands to be surveyed and set off as fast as became necessary for the purposes named.

The said provision reads as follows:

Provided, That within two years after the passage of

this act said company shall designate the general route of said road, as near as may be, and shall file a map of the same in the Department of the Interior, whereupon the Secretary of the Interior shall cause the lands within fifteen miles of said designated route or routes to be withdrawn from pre-emption, private entry, and sale; and when any portion of said route shall be finally located, the Secretary of the Interior shall cause the said lands hereinbefore granted to be surveyed and set off as fast as may be necessary for the purposes herein named.

The said proviso did create a reservation, but following upon the filing of a map of general route, both of which doings it specified and commanded. But it protected the public in the person of intending purchasers or pre-emptors by, at the same time, putting pressure on the company to make its *definite location;* for the surveys, which were necessary to the settler and indispensable before there could be a purchaser or incumbrancer from the United States or the company, could only be ordered after the line was definitely fixed.

It will thus be seen that, though this section did, to some extent, mark a departure from the theretofore prevailing policy of continuing in force the normal operation of the land laws until definite location, yet care was taken to minimize the result. The surveys were not to be made until *after final location.* Until that act was performed, therefore, the withdrawn lands along the delineated general route remained unsurveyed and, in that condition, were not subject to either private entry or sale, for both of those forms of disposal are restricted by law to surveyed land; they were only subject to settlement with a view to pre-emption, and without the right even in the settler to evidence his proposed purchase as a pre-emptor by a filing in the land office, for that can only be done after survey.

Legislative precedent, public policy, and judicial de-

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The Charles River Bridge *v.* Warren Bridge, *supra.*
Slidell *v.* Grandjean, 111 U. S. 412–437.

But it is urged that this view makes of the said clause of section 6 a mere duplication of the provisions of section 3, and, therefore, is a work of supererogation on the part of Congress, which is not to be supposed.

Reiteration is not unknown to the literature of statute law, and it is common practice to give notice by apt phrase that things ordained to be done in one section of a given law are not to be taken as modifying the provisions of another section or provision of the same act. This is usually done in form of proviso, but it may be done otherwise.

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The situation of the granted lands, as left by the third section, was that almost the whole mass was in a section of territory into which the public surveys had not been extended, and toward the greater body of which they had not even approached.

The *termini* were at the head of Lake Superior and the shores of Puget Sound. The report of the Commissioner of the General Land Office for the years 1863 and 1864 shows that even in Minnesota the lands were not surveyed for a part of the proposed route, and that from the western line of that State to within eighteen miles of the shores of the sound the whole vast area was unsurveyed.

The act of 1864 gave no bonds of the United States in aid of the project, and incumbrance by mortgage of any of its property and the issue of construction bonds was forbidden, except by the consent of Congress (sec. 10). As provided by that act the sale of its stock and of the granted lands constituted its sole construction fund. Under these circumstances the prompt survey of the lands along the line was a paramount consideration to the company and to the United States. But in the orderly progress of the public surveys, proceeding as they do upon lines of extension from established meridians, and only as fast as required by the progress of settlement, a generation would have passed before any considerable part of the lands of the grant would have been reached.

This was a serious situation, and the more so since, by the terms of the eighth section, every grant and privilege contained in the act was conditioned on the commencement of the work of construction within two years, on the completion of not less than fifty miles per year after the second year, and the full completion and equipment of the whole road within twelve years.

We may confidently repeat, therefore, that the motive

and purpose of the said sixth section was the extension of the surveys. But this was to be done only "as fast as may be required by the construction of said railroad."

Construction must and does invariably follow upon definite location. Thus, whilst providing for the delineation of a tentative line as a condition precedent to setting the surveys in motion, the legislative mind was, even in that particular, considering a period when the limitations of section three would be in force.

Congress still had that condition in view when the three following lines of the section were penned (the clause under review). The words therein used, "the odd sections of land hereby granted," were, therefore, naturally and aptly used in their literal and obvious sense and meaning. The sale, entry, or pre-emption forbidden was, therefore, of such lands and such only as would be found to be clear of attaching rights or claims at the time the line of the road should be definitely fixed.

It is a rule of construction that "a passage will be best interpreted by reference to that which precedes and follows it."

Neal *v.* Clark, 95 U. S. 704.

In the exposition of a statute the established rule is that the intention of the law-makers is to be deduced from a view of the whole statute and every material part of the same.

Kohlstadt *v.* Murphy, 96 U. S. 153.

The clause as it stands and is thus interpreted is not mere surplusage or vain repetition. The surveys were ordered to proceed. Their execution would not wholly depend on the alacrity with which the President would respond with his order on notice that the general route had been selected. The speed with which Congress

would furnish the necessary funds was an uncertain but necessary factor. They might at times and in places precede definite location and construction, and at other times lag behind. If they preceded definite location, the company and proposing purchasers from it were warned not to attempt sale, disposal, or purchase in any form whilst the lands were in that condition or whilst they were unsurveyed, nor under any form or condition except "as provided in this act."

We can indubitably determine what this means as to the company. It must be invested with the title, by definite location as prescribed in section three, but could only receive the prescribed evidence of title as each twenty-five miles of road was built and accepted (section 4). This was proper warning and no more than the abundance of caution which the great interests at stake naturally suggested. If this be sound interpretation of the meaning of the words "as provided in this act" as applied to the company, can there be a wholly different interpretation given to the same words, used in the same connection and in the same sentence, when applied to other possible takers of the lands in the granted limits? No such result is worked by the law as it is written. It would require the court to import into the statute an explanatory and enlarging proviso to accomplish it. But this is not permitted,—the canons of construction forbid it.

IV.

Counsel for plaintiff in error assert, at page 17 of their brief, that the placer locations set up in the amended answer were "admittedly without discovery of mineral."

This is erroneous. On the contrary, the said amended answer asserts that in all respects the said location pro-

ceedings were regular and lawful, and that the proper proof was presented before the register and receiver; that the locators—

" had discovered mineral thereon, and had located said quarter section as mineral land, and claimed the same as such for valuable mineral deposits therein."
Record, p. 17.

The company's demurrer admitted this. We have heretofore quoted from the said amended answer the admission made upon the subject of the mineral character of the lands, which is that, upon the issue tried in the Land Department, they were determined to be not commercially valuable for their minerals.

There has been some confusion in construing and attempting to harmonize the decisions of the courts upon the question of what constitutes a " valuable mineral deposit " in the sense of section 2319, R. S.; a valid " mining claim " in the sense of section 2320; of land claimed and located for valuable deposits in the sense of section 2325, and of lodes " known to exist within the boundaries of a placer claim " in the sense of section 2333, Revised Statutes.

The apparent confusion has arisen from failing to distinguish between controversies which deal only with the incidents necessary to create the estate which follows from, and stands only upon, a location, and that which is created by the showings necessary to prove a right to take a patent, and the estate vested by such patent.

The authorities in which these questions have been discussed have generally related to lode claims; and those which have been most prominent have arisen in the pursuit of rights under section 2333, wherein a patented placer claim has been assailed on the ground that it con-

tained a vein or lode *which was known to exist within the boundaries of the placer* at the time a patent was applied for; or where mineral claims have been asserted within an entered or patented town site, the crucial question in such cases being what constitutes a *known vein or lode* in the sense of that section or in the sense of the mineral exceptions found in town-site acts.

United States *v.* Iron Silver Min. Co., 128 U. S. 673.

Iron Silver Min. Co. *v.* Mike & Starr Co., 143 U. S. 394.

Davis, Adm., *v.* Weibold, 139 U. S. 628.

In such controversies, involving, as they do, an assault upon the validity of an outstanding patent of the United States, proofs certain and ample have been required to establish the existence of a known vein or lode, including the extent or commercial value of the minerals contained in it.

But where the question at issue has been the requisites of a vein which justify a *location only*, under section 2320, they are different.

But slight indications of a defined and mineral-bearing ledge have been held sufficient to support a location.

"A valid location of a mining claim may be made whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following it in expectation of finding ore, and that a valid location may be made of a ledge deep in the ground and appearing at the surface, not in the shape of ore, but in vein matter only," is held in Burke *v.* McDonald (Idaho), 29 Pac. 101; Harrington *v.* Chambers (Utah), 1 Pac. 375 (affirmed, 111 U. S., 350, 356; Eilers *v.* Boatman *et al.*, 111 *id.* 356); Book *v.* Justice Min. Co., 58 Fed. 106, 120.

This view is in plain accord with the definitions given in North Noonday Co. *v.* Orient Min. Co., 6 Saw. 308; 1 Fed. 522; Jupiter Min. Co. *v.* Bodie Consol. Co., 11 Fed. 675; Mining Co. *v.* Cheesman, 116 U. S. 535-536.

In *Gregory* v. *Pershbaker* (14 Fed. 401, 404) the supreme court of California, whose decisions upon mining questions are of high authority, went so far as to hold that, as to placer claims, there is no condition in the acts of Congress, in the local laws, or in the practice of miners which requires the actual discovery of valuable minerals before valid location can be made.

It follows upon this that it is not necessary to the location of a valid claim under section 2320 or 2329 that ore of commercial value in either quantity or quality must first be discovered within its limits.

Montana Cent. Ry. Co. *v.* Migeon, 68 Fed. 811, 814.

A finding on patent proceedings that ground applied for as placer land is not shown to be commercially valuable as such cannot, therefore, be taken as a judgment that the location was invalid, or that no claim under it ever attached to the land.

Bouvier, following Stowell *v.* Stouch (Plow. 359), defines a claim as a challenge of the ownership of a thing which is wrongfully withheld from the possession of a claimant.

In Prigg *v.* Pennsylvania (16 Pet. 615) the term is defined: "It is, in a just and judicial sense, a demand of some matter as of right, made by one person or another to do or forbear some act or thing as a matter of duty."

The Standard Dictionary defines the word as,—1. "The demand of something from some one on the ground of right; the assertion of a right to possession or ownership; 4. Anything that is claimed; especially a tract of government land to which a settler lays claim by virtue of

occupancy or by other right; also, a region or tract claimed for mining."

In Whitney *v.* Taylor (45 Fed. 616, 617) it was said: "The word 'claim' as used in the act was not intended to be restricted to such homestead and pre-emption claims as should afterwards ripen into perfect title, but was intended to include all claims that were made in such form as to be recognized and allowed by the Land Office without any regard to the question whether they were valid at the time of filing or whether they were afterwards perfected, abandoned, cancelled, or forfeited."

That case was brought here on writ of error and was decided at the last term (158 U. S. 85). It contains the latest expression by this court on the now somewhat hackneyed subject.

By the opinion in that case it stands decided, as often before held, that "The condition of the title at the date of definite location determined the question as to whether the land passed to the railroad company or not."

That it is the *attachment* of a claim to a tract of land which excepts it from a grant, and that with the performance of after conditions necessary to make the attaching title good the company had nothing to do, its interest having ceased upon the attachment of the claim "as much as if in a deed it had been excluded from the conveyance by metes and bounds" (p. 89).

That the principle to be deduced from such cases as Kansas Pacific Ry. *v.* Dunmeyer, Hastings & Dakota Ry. *v.* Whitney, Barden *v.* Northern Pacific Ry., and Newhall *v.* Sanger, is, "that when on the records of the local land office there is an existing claim on the part of an individual under the homestead or pre-emption law, which has been recognized by the officers of the Government and has not been cancelled or set aside, the tract in re-

spect to which that claim is existing is excepted from the operation of a railroad land grant containing the ordinary excepting clauses, and this notwithstanding such claim may not be enforceable by the claimant and is subject to cancellation by the Government at its own suggestion or upon the application of other parties.

"It was not the intention of Congress to open a controversy between the claimant and the railroad company as to the validity of the former's claim. It was enough that the claim existed, and the question of its validity was a matter to be settled between the Government and the claimant, in respect to which the railroad company was not permitted to be heard" (p. 92–'3).

If the claim of the mineral locators was void *ab initio*, that must have been a fact *ab initio* as certainable. But confessedly it required investigation and the weighing of evidence as to whether it was or was not mineral land in the largest and ultimate sense of being commercially valuable as a mine and entitled to go to patent.

As a claim the recitals of the answer show it to have been valid and complete. It was held to be sufficient by the local land officers as to the demands, allegations, and proofs which, by law and regulations, are requisite to the admission to record of mining claims, and sufficient to impose upon them the duty under section 2325, R. S., of publishing the notice therein prescribed which puts a period to the right of adverse claimants to appear and intervene in the controversy. It is held in the Land Department that a claim so filed "is *per se* a segregation of the land covered thereby."

Sec'y Smith in Gibson's case, 21 L. D. 219.

The issue which was afterwards raised by the protests of the plaintiff company and these defendants in error

was upon matter of fact only. In such controversies the decision is binding upon the parties to them, but not necessarily correct and in accord with the very truth of facts. There may have been failure on the part of the claimants to produce evidence which was really in existence; their operations may have stopped just short of a point where paying deposits would have been reached. The register and receiver who were the jury in the case, as well as the court, may have had a standard of commercial value higher than was just; deposits which, under the methods of mining and extraction prevailing at one period, are regarded as without value, under later and improved methods become capable of yielding a profit. Many abandoned locations are afterwards developed into paying properties by miners of larger means and energies. The finding of the Land Department to-day in a pending controversy, that the claimants have not established the mineral character of a given tract, does not, so long as it remains public land, withdraw it from the class of land "free and open to exploration," nor in the least impair the right of the later successful explorer to take final title to it as mineral land. There can therefore be no warrant for the contention that a non-mineral finding in patent proceedings must be accepted as a judgment that the claim on which they were predicated was at any stage of its progress void.

The case of the company in Hastings & Dakota R.R. Co. *v.* Whitney (*supra*) proceeded very much on these lines, but the court did not give them its sanction.

By the contract between the Government and the company involved in the third section of the act of 1864 the United States agree to give, and the company agreed to receive, a valuable consideration by way of indemnity for the exclusion of the latter from any interest in tracts or

in controversies concerning them to which at definite location the title of the United States (not of the company) was not clear. If found to be reserved, appropriated, or "otherwise disposed of" at that time, or if pre-emption, homestead, or other claims or rights had then attached, other tracts were "to be selected by said company in lieu thereof." This insured the absolute impartiality of the tribunal, though it was that of the United States, for as to the company and the Government the denial of right to one tract was the award of another and there remained an unprejudiced and untrammeled forum within which the citizen claimant under the public land laws could pursue his remedy.

The questions raised by the specifications of error seem to us to have been already decided in this court, and against the views urged by the plaintiff in error, and that the judgment below must be affirmed.

Respectfully submitted.

S. S. BURDETT,
Attorney for Defendants in Error.

166-620

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166-620.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE NORTHERN PACIFIC RAILROAD Company, plaintiff in error,
v.
JUNIUS G. SANDERS, WILBUR F. SANDERS, JAMES U. SANDERS, and SAREPTA M. SANDERS. } No. 12.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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to avert to the fact, that the case is here on demurer to the answer of the defendants to the plaintiff's complaint.

The question is "whether or not a mining location made according to law, upon an odd section of land, within the limits of the Northern Pacific Railroad Company's grant, and an application made by the locators thereof to patent such land in the United States Land Office as mineral land, and claiming the same to be such, and filing all the necessary proofs of location, mineral character, and work accompanying such application as is required by law and the rules of the Land Department, and which is pending, and a contest in regard to the right of said parties to patent the same is existing in the United States Land Office at the time the railroad of said company was definitely fixed, is sufficient to take said land out of such grant, although admitted now to have been nonmineral in character, and hence not subject to be located or patented as mineral lands."

The *Act of July 2, 1864* (13 Stat., 365), grants—

> * * * every alternate section of public land, *not mineral*, designated by odd numbers, to the amount of twenty alternate sections per mile, each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad, whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and *free from* preemption *or other claims or rights at the time the line of said road is definitely fixed* and a plat thereof filed in the office of the Commissioner of the General Land Office. * * *

> *Provided further*, That all mineral lands be and the same are hereby, excluded from the operations of this act.

The complaint (Rec., 14) charges and admits:

> That thereafter, to wit, July 6, 1882, plaintiff definitely fixed the line of its said railroad, extending opposite to and past said section 21, township 10 north, range 3 west, and filed a plat thereof in the office of the Commissioner of the General Land Office. That said land is on and within 40 miles of said line of railroad so definitely fixed as aforesaid.

The answer to the complaint (Rec., 22), after setting forth in detail the entering upon and possession of said land as mineral land, and the entry thereof in the United States Land Office, and the compliance with all the requirements of the law as to the location and application for patents of mineral lands, and the protest against and the contest of such application by the plaintiff in error here, avers:

> The said application was continued thereafter by consent of parties, or otherwise, from time to time, and was asserted and remained pending on the 6th day of July, 1882, and thereafter the said applicants, on the 6th day of July, 1882, and thereafter as theretofore averring their ability to prove that the said land was commercially valuable for the gold therein contained and was mineral land within the definition of that phrase contained in the act granting lands to said plaintiff, etc.

So that it appears, and on demurrer must be taken to be true, that prior to and on the day that the line of said railroad was definitely fixed the fact of an existing *claim*

to the land herein described was not only known to the plaintiff in error here, but was then being contested by it.

It is idle and frivolous to engage in a dispute as to what is meant in the statute by "claims," and, on this demurrer, whether such claim existed here as was contemplated and provided for by the statute. A "claim" is not necessarily or generally a *right*. The right may be finally ascertained and established upon the assertion and prosecution of a claim. But it is a waste of time to stay upon the inquiry whether one who comes within the provisions of chapter 6, Revised Statutes, "Mineral lands and mining resources," and has taken the steps therein pointed out, has a *claim*. Surely he has as much of a claim as one who makes a preemption filing or homestead entry.

The statute does not even require that it shall be a *valid* claim, or a good claim. It does not expressly require that it shall be made *bona fide*, although perhaps this is implied.

In *Weeks* v. *Bridgman* (159 U. S., 545), which was a case of a preemption filing, Mr. Chief Justice Fuller, delivering the opinion of the court, said:

> But under the granting act lands to which preemption rights had attached when the line was definitely fixed were as much excepted therefrom as if in a deed they had been excluded by the terms of the conveyance. And this was true in respect of application for preemption rejected by the local law office and pending on appeal in the Land Department at the time of definite location, *since the initiation of the inchoate right to the land would prevent the*

> *passage of title by the grant*, and the determination of its final destination would rest with the Government and the claimant. (*Ry. Co.* v. *Dunmeyer*, 113 U. S., 629; *R. R. Co.* v. *Whitney*, 132 U. S., 357; *Bardon* v. *R. R. Co.*, 145 U. S., 535; *Ard* v. *Brandon* 156 U. S., 537; *Whitney* v. *Taylor*, 158 U. S., 85.)

If "the initiation of the inchoate right to land" be such a claim as prevents the passage of title by grant, surely the pursuit of an object under and in accordance with the provisions of chapter 6, Revised Statutes, must be allowed to be the assertion and prosecution of a *claim*.

The question here is not whether the lands were finally ascertained to be or not to be mineral lands, but it is whether the defendants below—the defendants in error here—have set forth in their answer such a statement of facts as would, if true, entitle them to judgment.

It is undoubtedly true, as appears by many decisions of this court, that the validity of a preemption *claim* as against a railroad grant does not, in anywise, depend upon the final success of the preemption man in securing the land.

In *Hastings, &c., R. R. Co.* v. *Whitney* (132 U. S., 361) this court, commenting upon a former decision, said:

> The fact that such an entry may not be confirmed by the Land Office on account of any alleged defect therein, or may be canceled or declared forfeited on account of noncompliance with the law, or even declared void after a patent has issued, on account of fraud, in a direct proceeding for that purpose in the courts, is an incident inherent in all entries of public lands.

And it adds:

> In the light of all these decisions, the almost uniform practice of the Department has been to regard land *upon which an entry of record, valid upon its face, has been made*, as appropriated and withdrawn from subsequent homestead entry, preemption, settlement, sale, or grant until the original entry be canceled or declared forfeited, in which case the land reverts to the Government as part of the Government domain, and becomes again subject to entry under the land laws.

The railroad grant, as we have seen, excepted in express terms minerals from the grant.

And this court, in *Barden* v. *Northern Pacific R. R. Co.* (154 U. S.), has held that all mineral lands, other than iron and coal, are excluded from the operation of the grant, whether such minerals were known or unknown.

In *Northern Pacific R. R. Co.* v. *Marshall et al.* (17 Land Decisions, 546) it was ruled that:

> It will be presumed that the locators complied with the law and made a discovery of mineral prior to location. It follows, therefore, that the land was excepted from the grant unless it was shown by the company that the land was not mineral in character, and the burden of proof to establish this fact was rightfully placed upon the railroad company.

In *Whitney* v. *Taylor* (158 U. S., 94) Mr. Justice Brewer, speaking for the court, adverts to the fact—

> That the granting clause of the Pacific Railroad acts, differing from similar clauses in other railroad grants, excepts lands to which preemption or

homestead "claims" have attached, instead of simply cases of preemption or homestead *rights*.

And he adds:

> And the filing of this declaratory statement was, in the strictest sense of the term, the assertion of a preemption claim, and when filed and noted it was officially recognized as such. Indeed, if this is not so, there is no preemption claim of record until the full right of the preemptor is established by proofs and the final entry, etc.

And, again, in speaking of homestead and preemption entries, he says (p. 95):

> The purpose of each is to place on record an assertion of an intent to obtain title under the respective statutes.

And so exactly is the purpose of the locator of a mining location under chapter 6 of the Revised Statutes.

The act creating this grant contains two distinct, substantial exceptions, limiting the subject-matter granted. (1) All mineral lands; (2) so much of the land embraced in the grant as is subject to "other claims or rights." The first exception obviously applies to so much of the land granted as is in fact "mineral land." The second exception is wholly different. It does not to any extent depend upon the fact that the claim asserted is well or ill founded. It perhaps involves—we may assume that it does—that the claim is asserted in good faith.

The answer to which this demurrer is tendered sets out with great minuteness of detail the facts which entered into and constituted the claim or claims that had been filed and actively asserted and were yet pending

under a contest with the plaintiff in error when the line of its railroad was definitely located.

How can the railroad company be now heard to deny the existence of the claim of defendants when it has not only recognized it, but has disputed its validity, has formally joined issue upon it, has in every way recognized and acknowledged it as a substantial and serious menace to its own interest?

This claim, when and as asserted, was not a claim upon or against the Northern Pacific Railroad Company; it was a claim to these lands as public lands of the United States in which the defendants, in compliance with the statutes of the United States, had made oath—

> That they had discovered mineral thereon and had located the said quarter section as mineral land and claimed the same as such for the valuable mineral deposits therein; and that they had complied with chapter 6 of Title XXXII of the Revised Statutes of the United States.

The railroad company had nothing whatever to do with this claim so asserted. The only parties in interest having any right to contest it were the United States, and in such a contest neither the railroad company nor any other third person would be allowed to intervene.

So that it stands for all purposes, just as the inchoate rights of one who has merely filed a declaratory statement for preemption.

A "claim" undoubtedly had been asserted and contested, and the contest was pending and yet undetermined when the line of definite location of the railroad was fixed.

The question at issue between the claimant and the contestant was whether, at that time, the land was *mineral* or *agricultural*.

In *Holmes* v. *Northern Pac. R. R. Co.* (5 Land D., 333), a homestead entry was involved. The original entry was made January 2, 1875. Final certificate issued thereon October 9, 1877. The entry was canceled February 10, 1881. Holmes applied to amend his entry. The Secretary, after referring to the third section of the act of July 2, 1864, said:

> Holmes has continued to claim and occupy the tract in controversy and still claims and occupies it, and he is now here asking that his original entry be so amended as to include it. He occupied and claimed it at the date of the definite location of the line of the road. On the foregoing facts Holmes has a right to purchase under the act of June 15, 1880.

The question, as we have said, is not whether the land upon the final determination of the contest should be ascertained to be mineral, but whether a *claim* to it as mineral land had been initiated, recognized by the Government through its local land offices, and still pending *sub judice* when the line of definite location of the road was fixed.

In *Johns* v. *Marsh et al.* (15 Land D., 196), the question came before the Land Department as to a mineral entry made within the limits of this railroad grant and in the immediate vicinity of the tract of land involved here. Secretary Chandler, after quoting at length from *Davis* v. *Wibold* (139 U. S., 507), said:

> Upon the original survey this land was returned as agricultural in character; but upon the examina-

tion and survey thereof by the deputy mineral surveyor it was returned as mineral in character, and allowed to be entered as such. The allowance of this entry was an adjudication by the local officers that the land was mineral in character and overcame the original return of the Surveyor-General. After said entry was allowed the land appeared on the records as mineral land, and the burden of proof rested on one who sought to attack the record thus made.

HOLMES CONRAD,
Solicitor-General.

166-630

166-620

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE NORTHERN PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,
vs.
JUNIUS G. SANDERS ET AL.

No. 12.

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

REPLY TO BRIEF OF SOLICITOR GENERAL.

A. T. BRITTON,
A. B. BROWNE,
Attys. for Plaintiff in Error.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1897.

IN THE

Supreme Court of the United States.

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THE NORTHERN PACIFIC RAILROAD COMPANY,
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No. 12.

REPLY TO BRIEF OF SOLICITOR GENERAL.

At date of the grant (1864) and at date of filing the map of general route (1872), and for years subsequent thereto, the land in controversy was a vacant, odd-numbered section of agricultural land, not within any of the exceptions to the grant, but in all respects subject thereto. Subsequent to both of the dates above mentioned, but prior to the filing of the map of definite location (1882), the land was embraced in a mining location filed with the State local mining recorder. The locators thereupon came into the U. S. Land Office and, as a necessary basis for an application to purchase under the mining laws, they offered to prove that the land was mineral in character. The Railroad Company filed protest, and an enquiry was

thereupon instituted by the United States to ascertain the character of the land, which enquiry was pending and undetermined at date of definite location. Long subsequent thereto certain other parties, in nowise privies of the original mineral locators, and admitting the land to have at all times been agricultural in character, filed application therefor under the homestead law, alleging that the land was excepted out of the grant because the application to purchase and the enquiry as to its character pending at date of definite location constituted a "claim" within the meaning of section three of the granting Act. This case turns wholly upon the soundness of that contention.

The parts of the Statute which define this grant of lands are naturally divisible into two principal classes:

1st. Lands not granted at all.

2d. Lands which, though originally granted, were subsequently, by the conditions of the grant, excepted or carved out from its operation.

The first class embraces lands which were never within the geographical limits of the grant; it embraces even-numbered sections; it embraces odd-numbered sections within the lateral limits of the grant, but not then owned by the United States; and it embraces *mineral lands*. Such lands never fell within the limitations or exceptions of the grant, because they were *never granted*. One cannot except something out of a grant unless there was first a grant.

The second class embraces lands which were at the date of the grant subject thereto, but which subsequent thereto and prior to date of definite location were reserved, sold, granted, otherwise appropriated, or embraced within pre-emption or other claims or rights. Whilst *these* lands were granted, they were not identified until definite loca-

tion. Until withdrawn under filing of map of general route (1872) the United States stipulated to continue its ordinary power of disposition under the general public land system, and excepted all lands so disposed of prior to such withdrawal, whether such disposition was inchoate or perfected.

The distinction between these two classes is made clear by the different dates at which the railroad title either finally vests or fails to vest as against the United States. In the case of lands subject to the grant at the date thereof but subsequently excepted by reason of the occurrence of the several excepting conditions, the line is drawn sharply upon the date of definite location. The moment that definite location is perfected, the right of adverse disposition by the Government ceases, and the railroad title completely attaches. But in the case of lands not granted at all (as, for instance, mineral lands) the right of enquiry as fixed by decision of this Court in the Barden case (154 U. S.) extends until issue of patent, and as fixed by the subsequent classification law of February 26, 1895 (28 Stats., p. 683), it extends until approval of the classification by the Secretary of the Interior. If a tract of land subject to the grant at the date thereof is not, for illustration, covered by "other claims or rights" at date of definite location, right there and then the railroad grant absolutely vests and "other claims or rights" could not be subsequently initiated. But if a tract can be shown to be mineral at any time prior to patent as held by this Court *supra*, or prior to approval of classification by Secretary of the Interior, as fixed by the Act of 1895, the railroad title fails, no matter how long subsequent to definite location the ascertainment may have occurred.

Now in the case at bar the enquiry before the Land Department was not as to the compliance by the alleged

mineral locators with the requirements of the mineral law. So far as the railroad grantee was concerned, there was neither interest nor right of enquiry into the sufficiency of the mineral claimant's proofs,—such, for instance, as to whether they had made the requisite expenditures for annual improvements, or had made the prescribed publication, or had secured proper survey, or tendered sufficient purchase money. The sole enquiry, in which it had right of challenge, was as to whether the land was agricultural or mineral. That enquiry was primarily instituted at the instance of and conducted by the Government itself. If it proved the land to have been agricultural in character, then there never could have been a mineral location, either in law or in fact, because the discovery and existence of mineral is the invariable condition precedent to a location prescribed by the mining law. In such case the land was and always had been subject in every respect to the railroad grant, freed from any character of either excluding or excepting or limiting conditions. If, on the other hand, the land proved to be mineral in character, that demonstrated that the land was never granted to the railroad company; and never having had any interest therein, it necessarily had no right to challenge the sufficiency of the locator's proofs or to otherwise contest them.

The question was not, then, as to whether a recognized claimant had a good, bad, or indifferent claim. It was rather whether he ever had a "claim" at all. Suppose, for illustration, that some one sought to locate scrip upon any, or even upon all of the odd-numbered sections embraced in the grant upon the assertion that the grant never embraced odd-numbered sections at all, or that, if having embraced them originally, the grant had been absolutely forfeited so that the originally granted lands had

been restored to the public domain and had thereby become subject to location. Suppose that an enquiry into the correctness of the alleged facts necessarily underlying this assertion was pending at date of definite location, and that subsequently it was authoritatively decided that no such facts of non grant, or of forfeiture, ever existed, and that the land had been at all times subject to the grant? Could it be contended, with the slightest show of reason, that the pendency of an enquiry as to whether the grant included odd-numbered sections or whether it had been forfeited would constitute the "claim or right" excepted by section three, *supra*?

Or suppose that some one sought to locate a quarter section upon the ground that it had been erroneously marked on the official survey as an odd-numbered section, when in fact it was properly an even-numbered section, could the pendency of that enquiry at date of definite location eliminate the tract from the grant?

Or suppose that some one sought to locate odd-numbered sections upon the averment that they were situate outside of the lateral limits of the grant, and upon enquiry it was determined that the location was within the lateral limits, would the pendency of that enquiry at date of definite location constitute the "claim or right" contemplated by section three, and so operate to divest the railroad title?

It is submitted that the suggestive illustrations clearly mark the line of distinction which should be recognized in this case; and that the principle illustrated is quite as applicable to character of land as to location of land, or questions of forfeiture or of original grant. It is not as to the sufficiency of a claim which was lawfully initiated and might have been lawfully prosecuted, whether it was so or not. It is as to the existence of the facts, upon whose

existence alone there ever could have been a claim on the one part or a grant upon the other part. If the enquiry proves the land to be mineral, it was never within the grant, no matter whether there was an adverse "claim or "right" or not, and without the slightest reference to the point of time indicated by the date of definite location. If, on the other hand, the enquiry proves the land to have always been agricultural, then there never could have been a mineral location thereon, because the condition precedent thereto was the discovery and existence of mineral. It is not to be forgotten that a mineral location is not made of record with the United States, or in any of the United States land offices. It is made entirely with the local State mining recorder, over whom the United States has no jurisdiction, and it is only recognized by the United States upon an application to purchase the lands so located, when a discovery and existence of mineral is proven and establishes the lands to have been mineral in character, and hence subject to such location.

The error of the learned Courts below consists clearly in confounding the subject-matter of the thing granted, *i. e.*, "public lands *not mineral*," with the assertion of a right or claim cognizable only under a law having exclusive application to land of character *not* so granted, *i. e.*, "public lands *mineral*."

In other words, the "claim or right" whereon it is assumed this tract is excepted from the operation of the grant could only exist in any possible view with respect to mineral lands which were not granted at all. A "claim "or right" cannot possibly except lands from the operation of the grant when the very nature of such claim or right applies only and solely to the class of lands which are *without* the general description of the grant and clearly never intended by Congress to be embraced thereby.

This brief is filed in special view of the brief recently volunteered by the Solicitor General of the United States, and to clear up the manifest misapprehension therein as to the real question at issue. The citations therein have no application here, as they deal entirely with lands granted but subsequently excluded by agricultural claims or rights initiated between the date of the grant and the date of definite location; as to which classes of exceptions there has been and is no controversy.

Respectfully submitted.

A. T. BRITTON,
A. B. BROWNE,
Att'ys for Plaintiff in Error.

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Respectfully submitted.

A. T. BRITTON,
A. B. BROWNE,
Att'ys for Plaintiff in Error.

166-620

MAR 11 1
JAMES H. McKEN

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

166-620

THE NORTHERN PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

v.

JUNIUS G. SANDERS ET AL.

No. 12.

Supplemental Brief for the Defendants in Error.

S. S. BURDETT,
Att'y for Defendants in Error.

WASHINGTON, D. C.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
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OCTOBER TERM, 1896.

THE NORTHERN PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,
v.
JUNIUS G. SANDERS ET AL.
No. 12.

Supplemental Brief for the Defendants in Error.

In their reply to the brief of the Solicitor-General (as does also the brief of Messrs. Spooner and Bunn) counsel for the plaintiff in error enlarge upon the plaintiff's contention in this court that the lands here in controversy never held the status of "mineral lands" in the sense of the act of 1864; that the proceedings of the mineral locators and applicants on which defendants in error rely as having worked the exception of the located tracts from the grant were but an inquiry instituted by the United States to ascertain the character of the land, and that the excepting clauses of the grant are divisible into two principal classes, viz:

"1st. Lands not granted at all.

"2d. Lands which, though originally granted, were subsequently, by the conditions of the grant, excepted or carved out from its operation."

Whatever conclusion may have been intended to be drawn by the plaintiff from this particular statement of the exceptions of the statute, it must fall if it has no other support than the grouping itself affords.

No lands falling within either or any of the exceptions or limitations named in the act were granted at all. The exceptions were not an afterthought, or a matter of rescue embodied in a subsequent statute, but a part of the original law. They were an enumeration of lands not granted. "The mineral lands" stood in that regard on the same footing as the "reserved, sold, granted, or otherwise appropriated" lands, and those which were not free from "pre-emption or other claims or rights."

The reason for the adoption of each exception may have been peculiar to itself, but the effect was common to all. No land described by either was granted.

The simple fact is that Congress designated a territory within which its intended grant was to operate. It did this by laying down certain exterior lines parallel to the definitely located road-bed, and thereupon provided that when, by the definite location of the road, those lines became ascertainable, that as to the lands contained within them certain tracts should fall to the company, and certain other tracts should not.

Definite location fixed the place of the road-bed, and therefore of the exterior boundaries of the territory of the grant, and so became the date of the attachment of the company's title to the granted tracts.

In our brief on rehearing we have, at pp. 12, 13, and 14, called attention to the erroneous description or statement of the proceedings taken by the mineral applicants

and the seeming misapprehension of the effect of the allegations of fact in the answer to the amended complaint which the demurrer admitted to be true. That answer alleged the existence of a location of these lands under the mineral laws made by qualified persons who performed every requisite of law and regulation necessary to its validity, including the essential prerequisite of the discovery of valuable minerals in their soil. These allegations are not matter of dispute in this case. The defeat of the application of the locators for a patent was not for failure of discovery of mineral or lack of proof in any essential of a valid location. Observance in those respects was not in question. It was upon the ground that the land was not shown to contain, under its then state of development, a sufficient quantity of the precious metals to make it commercially valuable therefor that the patent proceedings failed.

The contention of plaintiff in error as presented at page 4 in brief in reply to the Solicitor-General, comes to this: that a locator whose proceedings are regular and lawful and whose possession is impregnable down to the moment of time when he finds that he cannot make his claim yield a profit is thenceforward to be considered as never having had a claim at all; and that though such a claim may have been in full force and vigor on the day of the definite location of a railroad, its excepting force is not to be determined as of that day, but by conditions which may be developed on some future day, near or remote. Along with this contention runs the further one that valid location does not give distinguishing character to the located tract, and that nothing short of the development of a paying deposit can do so.

These positions seem to us not tenable. The right to explore and the right to locate that there may be security

whilst development work proceeds presupposes failure as well as success; but whether success or failure result, the *quality* of the right vested meanwhile in the locator is the same. An estate in the land vests in him; and the tract included by his location stakes becomes segregated from the mass of the public domain.

The classification of the excepting provisions of the granting acts becomes of real and practical significance when, and only when, questions arise connected with their enforcement.

When in the process of adjustment the sphere of *declaration* is passed, and that of *administration* is reached, the exception of "mineral lands" will often be found to be as truly based on the state of the title as are excepted lands of the agricultural class.

The right to explore the public lands with a view to the discovery of the minerals they might contain became by the act of 1866 the privilege of every citizen. The individual citizen so endowed became the claimant of a particular tract so soon as his general explorations ceased, and because of discovery there made he centered on that tract. He became under such circumstances, with respect to that land, a claimant with a vested right; a right and a title of that class which may pass by will or deed. True, some time, and at the last, his title may fail, but that also is an incident common to every class of exception, mineral or agricultural, which stands on the fact of the existence at date of definite location of some form of claim or right under the land laws. It is not in controversy now that such failure at a period subsequent to definite location in no wise concerns the grantee company. There was a time when the Land Department permitted the companies to intervene in such cases as parties in interest, itself taking the position of stake-

holder, handing over the tract to the claimant or the company, as the result seemed to warrant. This court put an end to that course of procedure by its decision in the Dunmeyer case (113 U. S. 629). The contention of the plaintiff in error, nevertheless, is that it survives as to failing locations under the mineral laws.

The question of whether tracts or bodies of the public lands are to be classed as mineral or non-mineral in the sense of the Pacific Railroad acts is not solely determinable by the state of the profit and loss account of the mining operator. If that were so, many great mines would show a checkered history. Last year expenditure, not profit, was the rule. Under the plaintiff's theory a tract on which such unprofitable expenditure was made was non-mineral in character; but if, this year, there is profit, then the tract is mineral.

There must be a better rule than this for the determination of so important a question. We suggest, with deference, that all those portions of the public domain which, by the law, as expounded by the courts are subject to appropriation as such, are of the mineral lands, and that such a tract duly appropriated by lawful location, based upon a discovery, must be held to be in that class so long as the location is lawfully maintained. This, after thirty years of administration, has come to be the rule in the Land Department, as shown by Mr. Secretary Smith's decision in the *Tam* case (21 L. D. 440).

The act of February 26, 1895 (28 Stats. 683), is founded on this view.

The duty of the commission created by that act was to examine the lands within the limits of this grant "*with special reference to the mineral or non-mineral character of such lands*" (Sec. 1), and to *classify* them as such (Sec. 2).

The third section gives the rules for determining what lands are to be considered of the mineral class and to be classified accordingly.

"Mineral (not mines) discovered or developed on or adjacent to such land" is to be taken into consideration in making the classification. The geological formation of the lands or the lands adjacent thereto is to be considered, "and the *reasonable probabilities* of such land containing valuable mineral deposits, because of its said formation, location, or character," are to be taken into account.

It is then declared that—

"When mining *locations* have been heretofore made or patents issued for mining ground in any section of land, this shall be taken as *prima facie* evidence that the forty-acre subdivision within which it is located is mineral land." It goes without saying that if a tract of land surrounding a located tract, but not included in it, is, by reason of its vicinity, to be classified as mineral, the located piece is itself to be so considered. Lands *prima facie* mineral are surely of the mineral class. It requires proceedings and proof to shift them from that condition.

If these contentions are sound the lands here in controversy on the day of definite location stood segregated from the body of the public domain, and were excepted from the grant:

1st. They were subject to the claim and had become and then remained the property right of the mineral claimants and locators.

2d. They were in that class of the public domain known as mineral lands.

3d. No subsequent change in the classification of such land could have any retroactive force or effect.

"The condition of the title at the date of definite location determined the question as to whether the land passed to the railroad company or not."

Whitney *v.* Taylor (158 U. S. 85, 89), citing Kansas Pac. Ry. *v.* Dunmeyer (113 U. S. 629, 644.)

Respectfully submitted.

S. S. BURDETT,
Attorney for Defendants in Error.

166-620

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CLERK

166-620

Supreme Court of the United States.

THE LAW ASSOCIATION OF PHILADELPHIA.

OCTOBER TERM, 1896.

No. 12.

Northern Pacific Railroad Company,

Plaintiff in Error,

vs.

Junius G. Sanders et al.,

Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR ON REHEARING.

S. S. BURDETT,
Att'y for Defendants in Error.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
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IN THE

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OCTOBER TERM, 1896.

THE NORTHERN PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

v.

JUNIUS G. SANDERS ET AL.

BRIEF FOR DEFENDANTS IN ERROR ON REHEARING.

STATEMENT OF THE CASE.

This is a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit.

The action is ejectment, and was brought by the plaintiff in error in the district court of the first judicial district, Territory of Montana (county of Lewis and Clarke).

On motion of the plaintiff, it was transferred to the United States circuit court for the circuit of Montana, where the trial was had.

There was complaint and answer (Rec., p. 5–7) and

amended complaint and answer (Rec., p. 13–16) and a demurrer to the said amended answer (Rec., p. 24).

The cause went to trial on the demurrer and there was a judgment thereupon for the defendant (Rec., p. 26; opinion, p. 27).

A rehearing was allowed on motion of plaintiff in error (R., p. 39), and the said demurrer was overruled, and judgment was again entered in favor of defendant for costs (p. 42). Opinion on rehearing, Rec., p. 48.

The plaintiff thereupon took the case by writ of error to the Circuit Court of Appeals, where the judgment below was in all things affirmed. (Rec., p. 69; opinion, p. 60.)

The cause was then brought to this court by writ of error, and upon assignments of error, seven in number. (Rec., p. 70.)

Assignments Nos. I and IV contain the principal contention on which plaintiff in error stands. The objection preferred against the judgment by these assignments is that it was held that the certain mineral locations, claims, and applications for patent mentioned and recited therein which were filed and pending in the local land office at the time the line of the road of the plaintiff in error was definitely fixed opposite thereto, excluded the tracts covered thereby from the description of public lands to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights.

The remaining assignments are, in the main, statements of the grounds on which the plaintiff in error holds the said assignments Nos. I and IV to be well taken and sufficient.

Those grounds are that the said mineral locations ought to have been held null and void and of no effect

whatever, because upon the trial of the applications of the locators for a patent it was found and held by the local officers that the lands located were not mineral lands in the sense of the mining laws of the United States. (Assignments Nos. II, III, and IV, Record, pp. 70, 71.)

The essential facts and proceedings set out in the amended answer, the sufficiency of which is called in question by the demurrer, are—

(*a*) That the lands in controversy are parts of an odd-numbered section within the place limits of the grant to the plaintiff company made by the act approved July 2, 1864. (Stats. at Large, Vol. 13, p. 365.)

(*b*) That at a time subsequent to the location of the line of general route (February 21, 1872), but prior to the date of the definite location of the line (July 6, 1882), they were occupied and located in due form as placer lands under the mineral land laws of the United States.

(*c*) That proceedings in conformity with law and regulations were instituted by the mineral claimants and locators in the proper local land office of the United States to obtain the patent of the United States therefor as mineral lands, and that these proceedings were had and pending before and at the date of definite location of the line of the Northern Pacific R.R. Co., and remained pending for some time thereafter. That pending said patent proceedings the plaintiff company filed a protest in said local land office against the issuing of a patent to the said locators, the ground of protest being that the said lands were not mineral in the sense of the exception in plaintiff's grant, but that said locators and applicants continued to maintain, and were so maintaining at and after the date of definite location, that the said located tracts were commercially valuable for the gold therein contained, and were mineral land within the definition of

that phrase as contained in the act granting lands to said plaintiff.

(*d*) It is confessed "that said premises did not contain gold or other precious metals in paying quantities or in such quantity as to make the same, or any thereof, commercially valuable therefor" (Record, p. 17).

The contention of the defendants in error is that the claim and proceedings thus initiated, asserted, and pending brought the tracts covered by them within the class of lands excepted out of the grant to the plaintiff company, and upon their rejection left them in the category of public lands of the United States subject to disposal under the general settlement laws, the particular provisions relied upon being those clauses of the third section of the act approved July 2, 1864, which except out of the operation of the grant lands reserved or otherwise appropriated, or to which claims or rights had attached at the date of the definite location of the line of road opposite thereto, and that it follows that upon the rejection of the mineral applications the lands before covered by them became subject to their homestead settlement and final appropriation.

The contention of the plaintiff in error is that lands in odd-numbered sections within the primary limits of the grant, which before and at the date of definite location were possessed, located, and filed upon for patent in the proper United States land office under the claim that they were public mineral lands, nevertheless inure to the company if, upon the trial incident to the patent proceedings, it is determined that they have not been shown to be of the mineral class in the sense of containing deposits commercially valuable, or capable of profitable working.

The sections of the act approved July 2, 1864, *supra*, which are material to this controversy are as follows:

"SEC. 3. *And be it further enacted*, That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: *Provided*, That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided, further*, That the railroad company receiving the previous grant of land may assign their interest to said 'Northern Pacific Railroad Company,' or may consolidate, confederate, and associate with said company upon the terms named in the first sec-

tion of this act: *Provided, further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road may be selected as above provided: *And provided, further*, That the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal: *And provided, further*, That no money shall be drawn from the Treasury of the United States to aid in the construction of the said 'Northern Pacific Railroad.'"

"SEC. 6. *And be it further enacted*, That the President of the United States shall cause the lands to be surveyed, for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre, when offered for sale."

ARGUMENT.

The grant to the company is of "public land." In Bardon *v.* Northern Pac. R.R. Co. (145 U. S. 535, 538) the court said, "The grant is of alternate sections of public land, and by public land, as it has been long settled, is meant such land as is open to sale or other disposition

under general laws. All land, to which any claims or rights of others have attached, does not fall within the designation of public land." At page 543 it is further said, "the rule of construction adopted, that, in the absence of any express provision indicating otherwise, a grant of public lands only applies to lands which are at the time free from existing claims, is better and safer, both to the Government and to private parties, than the rule which would pass the property, subject to the liens and claims of others. The latter construction would open a wide field of litigation between the grantees and third parties."

The third section of the act of July 2, 1864, contains the grant, defines its locus, extent and possible quantity, declares its exceptions, and fixes a day certain upon which then existing conditions shall settle whether any given tract is within the grant or falls within the exceptions. By its general frame and necessary implications the question of whether grant or exception shall prevail as to any tract within the limits is, so far as the administration of the grant is concerned, left primarily to the tribunal of the Land Department.

In every such controversy it is material to fix the time when the jurisdictiom of the Land Department over the disposal of tracts geographically embraced by the terms of the grant involved attaches and ceases. The legislative rule in such grants as to tracts clearly public and non-mineral—that is, tracts to which no claim is asserted by a citizen and no reservation has been ordered by the United States—is that such jurisdiction ceases when definite location is duly made.

Thereafter, as to those tracts, a duty may remain to be performed, but it is one purely ministerial and to the end of evidencing by certificate or patent the title which be-

came vested by the definite location of the line. This is true because by operation of law all such tracts became, *eo instanti*, segregated from the body of the public domain by the fact of such definite location.

But as to tracts which, though geographically embraced, may, by some provision in favor of the United States, or of some claimant under the United States be excepted out of the grant, the conditions are different.

As to them, there must, in the nature of things, be trial and judgment. The tribunal vested with primary jurisdiction to that end is the Land Department. The jurisdiction thus vested is not ministerial only but, as involving discretion and judgment, is *quasi* judicial.

The records of that Department will show, and they alone, whether at a given period a claim such as must be evidenced by proceedings in the local land office—such as a homestead, timber culture, desert land claim, or mineral application—has been propounded and remains intact; and within that tribunal must be tried the sufficiency of settlement rights, as under the pre-emption laws, or rights to mineral lands evidenced by location and improvement only, which on a given day—as, for instance, the date of definite location—had not been formally presented and applied for, but which were thereafter presented in due time and manner. These, and all claims falling within the exceptions to the grant, became by their presence of record, or by the performance of acts of settlement, improvement, or development of the land itself, pending cases which must proceed to judgment, as between the claimant and the United States, before any question could arise as to whether, as a result of the finding, the tract inured to the grant.

A provision of the act of July 2, 1864, among others, is that no lands pass to the company to which, at date of definite location, "claims or rights" had attached.

We agree that the "claims or rights" here referred to must be such as the Land Department may take jurisdiction of and is authorized to consider and determine under some provision of the public land laws; and we insist that, given such a case or claim duly existing at the date of the definite location of a line of road, the tract so claimed or affected is not of the body of the public lands subject to disposal either under the grant or under the general land laws, but stands segregated from the mass of the public domain and remains in that condition until the pending case or claim shall be disposed of by due course of procedure; and that in case of the disallowance of the claim the land freed from it takes again the status of public lands as of the date of such disallowance and becomes from that time subject to appropriation under proceedings *then* lawfully operative and under no other.

"Jurisdiction of the subject-matter is the power to deal with the general abstract question, to hear the particular facts in the case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power. It is not confined to cases in which the particular facts constitute a good cause of action, but it includes every issue within the scope of the general power vested in the court by the law of its organization." * * *

Foltz *v.* St. Louis & S. F. Ry. Co., 60 Fed. Rep. 316–319.

Jurisdiction is the power to hear and determine. The test of jurisdiction is whether the tribunal has power to enter upon the inquiry, and not whether its conclusion in the course of it is right or wrong.

Cornett *v.* Williams, 20 Wall. 226–249.

Colton *v.* Beardsley, 38 Barb. 30, 51, 52.

The allegations of the answer to the amended complaint to which the demurrer of plaintiff in error is addressed set up the facts that, at a time anterior to the definite location of the road, though subsequent to the date of the grant and of the designation of the general line of route, a mining claim had attached to the land. That the claim so attaching was in all respects regular and valid in form, and had progressed so far toward completion as that the proofs required by law had been tendered and filed in the local land office, and that such was the state of the case of the mineral claimants at and subsequent to the time when the map of definite location was filed by the railroad company.

The presence and pendency of these claims in the proper land office, we insist, lawfully invoked the jurisdiction, gave the power, and made it the duty of the tribunal to which they were addressed to enter upon inquiry as to their sufficiency to warrant the issuance of patents for the tracts claimed as being of the mineral lands of the United States. If this is so, a "claim" had attached and remained pending when definite location took place, and the tracts so claimed were thereby excepted from the operation of the grant.

The fact that there were such claims so presented and so pending, and in process of trial, is admitted by the demurrer, but the sufficiency of the fact to constitute an exception from the grant is denied on several grounds.

Stated in general, the position of the plaintiff in error seems to be that a mineral claim complete in form, and presented in due time and manner to the proper tribunal, and which would have lawfully ripened into a patent had the claimants sustained their contention that the land was commercially valuable as mining ground, must nevertheless be considered as no claim at all, and as never having,

in fact, attached to the land in any sense of the act of 1864, if the finding is that the land is not commercially valuable for its minerals.

The special grounds of appellant's contention below were:

1*st*. That the grant reserves from its operation two divisible classes of lands, namely, the mineral lands, which are excluded on account of their character as such, regardless of the state of the title, and other lands exempted by reason of the condition of the title at the date of definite location, the deduction being that since mineral lands are excluded under a clause of the act covering them as a class, no provision relating to the other class should be held to embrace them, because, it is urged, to do so would subject the act to the criticism of uselessly providing two grounds of exception applicable to the same lands.

2*d*. That claims to mineral lands cannot be supposed to have been within the contemplation of Congress in the making of this law, because at its date there was no act of Congress or any law under which a right or claim could be initiated to mineral lands.

3*d*. That the mineral claims which the defendants in error insist excepted the land from the operation of the grant had their inception subsequently to the delineation of the line of general route, and that under the provisions of the sixth section of the act such delineation operated as a withdrawal of all lands intended to be granted from liability to settlement, appropriation, or claim of any kind whatsoever save by the grantee company.

The contention of the appellant here is that the case turns upon the decision of two main propositions:

First. The land in controversy having been at all times admittedly agricultural, and having at date of the grant

in 1864, and at date of the filing of map of general route in 1872, and of the statutory and Executive withdrawals thereunder, been admittedly an odd-numbered section of vacant public lands, not mineral, within the place limits of the grant to which the United States had full title, not then reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, could any "claims" subsequently initiated by individuals operate to take the land out of the grant?

Second. If the land remained subject to the initiation of "claims" until date of filing the map of definite location, was the pendency of an inquiry as to the mineral or non-mineral character of the land a "claim" within the exceptions of the statute? (Brief for plaintiff in error, pp. 6 and 7.)

The first of these propositions seems based on the view that the filing of map of general route operated to exclude the right of exploration and location under the mining laws pending definite location.

The second proposition raises the question whether, if the land did in fact remain subject to the initiation of mineral claims, notwithstanding its inclusion in the withdrawal on general route, "the pendency of an inquiry as to the mineral or non-mineral character of the land" constituted a "claim" within the exceptions of the statute?

The frame of the said second proposition, especially of the sentence just quoted, and other positions of kindred import taken in the plaintiff's brief, seem to us to be so radically incorrect as to require correction at the outset.

1. The defendants in error here are not, as presumed at pages 5 and 6 of plaintiff's brief, the same persons, or any of them, who made the mineral locations or prosecuted the proceedings thereunder relied upon to defeat the grant.

There were four placer mining locations made, each location being for 160 acres, and represented by an association of eight persons. The several persons constituting each of the four associations are named in the several paragraphs of the answer to the amended complaint. (Record, pp. 17, 18, 20, 21.)

The defendants in error are named in the caption of the amended complaint. Answering a complaint in ejectment, they choose to attack and deny the title of the plaintiff, and to that end plead the existence and pendency of record of these several mineral claims. They asserted no interest in them, but claimed and are claiming here that they are sufficient to defeat the grant to plaintiff as to the tracts covered by them. If they shall be sustained in this contention, the matter of their own right of possession and to ultimate title will rest between themselves and the United States, to be determined by the Land Department.

2. The matter thus pending and of record in the local land office was not a mere "inquiry as to the mineral or non-mineral character of the land" involved. The thing pleaded as pending there at date of definite location was an application for a patent under the mineral laws for each of the tracts in controversy, supported by due proof of the discovery of minerals in the land, of its location as placer mining ground, and generally by a compliance in all respects with chapter 6 of title XXXII of the Revised Statutes of the United States. (Record, pp. 17, 19, 20, 22.)

The inquiry at page 16 of plaintiff's brief which reads, "was the pendency of an inquiry as to the mineral or non-mineral character of the land a 'claim' within the meaning of the statute," is not, therefore, fairly descriptive of the defence set up by the amended answer. The matter pleaded was a patent proceeding, *prima facie*, complete and valid in every particular of law and regulation.

3. The allegation at page 16 of plaintiff's brief that it is conceded "that no discovery was or could be made thereon," and at page 17 that "the facts disclose purported placer locations in 1880 and 1881 with the local mining recorder admittedly without discovery of mineral," is erroneous. The allegation of the amended answer as to each of the located tracts is that the locators, as a part of their patent proceedings, "made oath before the register and receiver of said land office that they had discovered mineral therein, and had located said quarter section as mineral land and claimed the same as such for the valuable mineral deposits therein." (Record, p. 17.)

The admission (R., p. 17) made in the answer to the amended complaint "that said premises did not contain gold or other precious metals in paying quantities, or in such quantity as to make the same, or any thereof, commercially valuable therefor," is not a confession that no discovery was made sufficient to support a valid location.

The decisive questions fairly stated from the record are:

First. Did the withdrawal effected by filing map of general route operate to except the odd-numbered sections embraced by it from the attachment of mining claims and rights?

Second. If the land remained subject to the initiation of mining claims and rights until date of filing map of definite location, was the pendency at that date, in the local land office, of an application in due form for a patent to the land under the mineral laws such a proceeding as brought the tracts in controversy within the exceptions of the statute?

I.

The act approved July 26, 1866 (14 Stats. 251), was in full force when and before any map of general route af-

fecting these lands was filed, and whilst, therefore, the lands afterwards identified by the definite location of the line were subject to the laws then in existence affecting the public domain, and to any further condition for the public weal that Congress might see fit to attach to them.

The said act of 1866, which was the first law regulating the disposal of the mineral lands of the public domain, attached to them the right of "exploration and occupation" by citizens of the United States seeking to test their mineral value with a view to their purchase as such.

In *Barden* v. *Northern Pacific R.R. Co.* (154 U. S. 288–320) the court said, in construing the act of 1864: "The privilege of exploring for mineral lands was in full force at the time of the location of the definite line of road, and was a right reserved and excepted out of the grant at that time."

"The privilege of exploring for mineral lands" when put in execution is, in itself, a claim of right under a law of the United States, and attaches therefore as a necessary incident to that clause of the act of 1864 which exempts the mineral lands from the grant made, and it furnishes a proper subject for the operation of the clause of exclusion which deals with "claims" to the public lands.

Erhardt *v.* Boaro, 113 U. S. 527.

The right to "explore for mineral land," and to attach a claim thereto by location, was recognized and protected before the passage of the act of 1866.

In Broder v. Water Co. (101 *U. S.* 274), 276, it was held to be "the established doctrine of this court that the rights of miners, who had taken possession of mines and worked and developed them, * * * are rights which the Government had by its conduct recognized and encouraged, and was bound to protect, before the passage

of the act of 1866." The court declares its opinion to be that the section of the act of 1866 it was considering "was rather a voluntary *recognition of a pre-existing right of possession* * * * than the establishment of a new one."

Applying this principle to the solution of the question it had in hand, as to whether lands within a railroad grant were excepted from it by such "pre-existing right of possession," the court held that under the common clauses of exclusion in grants to railroad companies Congress, in making these donations, "could not be supposed to exercise its liberality at the expense of pre-existing rights, which, though imperfect, were still meritorious, and had just claims to legislative protection," and it was particularly pointed out that "in construing the grant to the Pacific Railroad companies this principle is eminently applicable."

The grant under consideration was that of July 2, 1864 (13 Stat. 356), and particularly the clause of reservation found in Sec. 4 of that act which reads as follows:

"Any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land, *or other lawful claim*, nor include any Government reservation or mineral lands, or the improvements of any *bona fide* settler on any lands returned or denominated as mineral lands, and the timber necessary to support his said improvements as a miner or agriculturist" (p. 358).

Summing up, the court say: "Hence we have in the clause of reservation a much more liberal and extended protection of pre-existing rights than in the reservation clause which had become a formula in previous grants.

"Not only are prior reservations made by the Government, and rights of pre-emption excepted, but the im-

provements of *bona fide* settlers on land returned or denominated mineral lands, and the timber necessary to support the miner's improvements, and *any other lawful claim*, are unaffected by the grant. Of course, this means any honest claim evidenced by improvements or other actual possession."

The general doctrine of the case is supported by the court's citation (p. 276) of Atchison *v.* Peterson, 20 Wall. 507; Basey *v.* Gallagher, *id.* 670; Forbes *v.* Gracey, 94 U. S. 762; Jennison *v.* Kirk, 98 *id.* 453.

If now comparison be made between the clause of reservation above quoted and that found in the 3rd section of the Northern Pacific act, it will be seen that in each there is exclusion "on account of the state of the title" (preemption, homestead, and swamp land claims), and on account "of the quality of the soil" (*i. e.*, mineral lands), and it will also be seen that the exception found in the said quoted 4th section, "*or other lawful claim*," has its kindred provision in the said 3d section, in the words "or other claims or rights." If note be taken of the verbiage of these kindred sentences, it will be seen that that which the court construed in *Broder* v. *Water Co.* and found a sufficient basis to warrant the exclusion from the grant to which it applied of mineral and water-right claims, was more restricted in its scope than that found in the 3d section of the Northern Pacific act, in this, that the former vitalized only such as answered the description of "lawful claims," whilst the latter recognized "claims or rights" without further description. In other words, the liberalizing tendency in the matter of exceptions, noted by the court in the Broder case, was reproduced with something of emphasis in the said 3d section.

In *Jennison* v. *Kirk* (98 U. S. 453, 458), it was pointed out that for eighteen years prior to the passage of the

initial mining act of 1866 "the regulations and customs of miners, as enforced and moulded by the courts and sanctioned by the legislation of the States, constituted the law governing property in mines, and in water on the public mineral lands;" and that "the policy of the country had previously been, as shown by the legislation of Congress, to exempt such lands from sale."

To the same effect is *Morton* v. *Nebraska*, 21 Wall. 660. Adopting a phrase from the opinion in that case (p. 669), when the subject of the framing of exception to the grants to the Pacific railroads was under consideration, "there was certainly no reason why a long-established policy, which had permeated the land system of the country, should be abandoned." That "mineral lands" should in these grants be added to the "reservation clause which had become a formula in previous grants" was natural, for the roads were to penetrate and serve the mining regions; and it was quite as natural, having not only the mineral lands as such in view, but the citizen miner and prospector whose task was the identification of these very lands, that the exception of "other claims or rights" should also be added; for when these (Pacific) acts were passed mining claims or rights were the chief properties of the settled regions through which the roads were to run in the western half of their extension; and such was the state of the law and of the then public policy, with respect to the mineral lands (1864), that the locator of mining ground could not, if he would, advance his title beyond the stage of a "claim or right." It is not conceivable that the Congress which passed these acts could have been oblivious to the existence and rights of the great body of miners then on the very ground concerning which it was legislating, or have failed to provide for their protection. It is difficult to resist the conclusion that Congress in framing

the exceptions found in the said third section had specially in mind these very claimants. If this view is reasonable, it follows that mining claims or rights are quite as distinctly excluded from the grant because of the state of the title as are pre-emption claims. Upon reason this is so. The practical utility of adopting a form of exception which would protect the mineral claim as such becomes apparent when the fact, already urged, is considered, that, as the law then stood, it was through the efforts of the claimant alone that the mineral-bearing lands were to be discovered and segregated from the vast territory embraced in the gift to the company.

The authorities are therefore clear and conclusive that at the date of the grant (1864) a public policy prevailed which subjected the public domain to the right of exploration and location in the search for the precious metals, and that that policy had been put in form of law with the added right of purchase, and was in vogue when the map of general route was filed.

The sixth section of the act neither reversed this time-honored policy nor repealed the law. The protection that the withdrawal gave was against "sale, or entry, or pre-emption"—terms of well-ascertained meaning as applied to disposals under the general laws.

Kansas Pac. Ry. Co. *v.* Dunmeyer, 113 U. S. 629–638.

II.

The effect of the mineral applications pending at date of definite location stands, therefore, unaffected by any provision of said section six. The question is, did they constitute a "claim or right" within the meaning of the third section?

A location or other appropriation of public land under

statutory authority, even though so made or so conditioned as to be subject to avoidance or cancellation upon proper proceedings, is not void.

The sole parties in interest in such located tract are the United States and the locator. The officers of the Land Department are the tribunal vested with jurisdiction over the parties and the subject-matter, for at that stage it is a question of original disposal. Whether their decisions, when invoked, upon the validity of a location be right or wrong, they are effective and valid.

Even though a claimant be not in fact qualified to make the location, or may have failed in the observance of some statutory condition, yet, until cancelled, it segregates the land from the public domain and appropriates it to private use as effectually as it would do if the locator had been legally entitled to make it.

Wilcox *v.* Jackson, 13 Pet. 496, 513.
Witherspoon *v.* Duncan, 4 Wall. 210, 218.
Carroll *v.* Safford, 3 How. 441.
Railway Co. *v.* Dunmeyer, 113 U. S. 629.
Railroad Co. *v.* Whitney, 132 U. S. 357.

In *Weeks* v. *Bridgman* (159 U. S. 541, 546), this court held that the initiation of an inchoate right to the land "would prevent the passage of title by the grant, and the determination of its final destination would rest with the Government and the claimant." Citing, among other cases,—

Barden *v.* Railroad Co., 145 U. S. 535.
Ard *v.* Brandon, 156 *id.* 537.
Whitney *v.* Taylor, 158 *id.* 85.

In the same case (Weeks *v.* Bridgman, *supra*) the court say (p. 547): "It is rarely that things are wholly void and without force and effect as to all persons and for all pur-

poses, and incapable of being made otherwise. Things are voidable which are valid and effectual until they are avoided by some act, while things are often said to be void which are without validity until confirmed."

The Land Department now proceeds with the adjustment of railroad grants in conformity with the principles laid down in the cases last cited.

Railroad Co. *v.* Forseth, 3 Land Dec. 446–7.
Railroad Co. v. Lerch, *id.* 506.
Hollantz *v.* Sullivan, 5 *id.* 115, 118.
Henry Milne, 14 *id.* 242.
St. Paul, M. & M. Ry. Co., 18 *id.* 429.
Fish *v.* Northern Pac. R.R., 21 *id.* 165.
Southern Pac. R.R. Co., 21 *id.* 423.
Boumhoefer *v.* M. & M. RR. Co., 22 *id.* 292.
Needham *v.* Northern Pac., 23 *id.* 433.

Whether or not a tract claimed for its minerals is valuable as such is an issue of fact made by the law and the regulations in every case presented for patent. If the patent proceedings are *ex parte*, the proofs must show to the satisfaction of the register and receiver that the tract claimed contains a deposit of valuable minerals. If a third person intervenes, claiming some interest in the lands as a proposing settler under the general laws, and protesting their mineral quality, a formal hearing is held and testimony taken.

The character of granted land is for the determination of the officers of the Land Department.

Barden *v.* N. P. Railway, *supra*, p. 320.
Burfening *v.* C. & St. P. R.R., 136 U. S. 323.

That was the course actually taken with respect to the mineral locations which the defendants in error contend

excepted the land from the operation of the grant. It was in process of trial before the date of definite location and continued undetermined for some time thereafter, and during all the time the Land Office records evidenced the fact of the pendency of the proceeding.

Since it cannot be denied that the existence or non-existence of valuable mineral deposits in lands claimed for their minerals is in every case of ordinary disposal under the land laws, a triable fact in the Land Department, it must follow that the right to have such a trial and a determination thereon is a necessary incident of the estate which the United States reserved to itself in the act of 1864, when the mineral lands were excepted. If this is so, the title to lands concerning which such a controversy is present and undetermined must remain in the United States pending the decision of the controversy.

The principle has never been recognized by this court that a grantee company may intervene as a party in interest in a controversy of such character. But among those things which have been so definitely settled by its repeated decisions as to be no longer debatable ground, is the principle that the grantees of the public lands who occupy the position of beneficial adventurers will not be heard as litigants, nor awarded the position of interested parties, where a question arises, under the exceptions of the grant, upon a claim preferred and in existence when the promises of the granting act became merged into a severable estate by the act of definite location.

Pacific Railway Company *v.* Dunmeyer, 113 U. S. 629.

Hastings & Dakota Railroad *v.* Whitney, 132 *id.* 132.

Whitney *v.* Taylor, 158 U. S. 85.

If it be urged that these decisions, and the many other adjudications of like import, were rendered in causes

where the lands were found to be exempted by reason of the condition of the title, and not by reason of the character of the land, the answer is that in *Barden v. Northern Pacific Railroad* (154 U. S. 288–319) the court, as if anticipating such possible objection, said:

"As justly observed by counsel for the defendant in their very able brief, 'the reservation in the grant of mineral lands was intended to keep them under Government control for the public good, in the development of the mineral resources of the country, and the benefit and protection of the miner and explorer, instead of compelling him to litigate or capitulate with a stupendous corporation, and ultimately succumb to such terms, subject to such conditions and amenable to such servitudes, as it might see proper to impose. The Government has exhibited its beneficence in reference to its mineral lands, as it has in the disposition of its agricultural lands, where the claims and rights of the settlers are fully protected. The privilege of exploring for mineral lands was in full force at the time of the location of the definite line of the road, and was a right reserved and excepted out of the grant at that time.'"

It may be repeated here that the position of the plaintiff in error on this point of the controversy, if maintainable, tends to minimize and render barren of results the exception of the mineral lands contained in the grant. If it be true that the company retains a reversionary interest in lands located as mineral, as indicated by its contention, it may, at any time, by its own acknowledged agencies, or by the incitement of others, bring the locator into the forum of the local land office for a trial of the question of the commercial value of the vein or deposit upon which he is expending his time and money.

The explorers and locators of the mineral lands are often tempted to their work by but slight surface indications, and

often with no other assurance of success than is furnished by apparent geological conditions or the nearness of valuable finds in adjacent tracts, coupled with the presence of but slight leads of the precious metals. They may, and, as we know from the history of mining operations, often do, pursue these slender indications for years before they reach a paying deposit, or become satisfied that their efforts are in vain. The mineral laws have wisely safeguarded these operations by providing that the license to explore and locate shall continue to run so long as the good faith of the claimant toward the United States is evidenced by specified annual expenditures (Rev. Stats., sec. 2324). But if the act of 1864 is to be construed as changing all this by letting in a third party in interest, who may hang on the miner's skirts and call him in question at its pleasure, and at any point of his progress, or at all, it is easy to see that the vast and costly service which the explorers perform for the United States in this behalf will be rendered elsewhere than within the limits of railroad grants, thus practically annulling, or at least preventing the enforcement of, the clause of the grants excluding mineral lands from their operation.

There is but one theory of interpretation under which this contention of the plaintiff company can be sustained without the overthrow of the settled rulings of this court as to the effect of definite location, and that is to hold that the exception of mineral lands from the grant must be administered as though it read, lands *known* to be mineral at the date of the definite location of the line of route. This was the construction contended for by the company at the date when this action was brought (see paragraphs VI and IX of amended complaint, Rec., pp. 14 and 15), and was the issue maintained in this court in the company's behalf in *Barden* v. *Northern Pacific Rail-*

road, supra. It received its quietus in that case, the court saying, among other things: "To suppose that Congress intended any such limitation would be to impute to it a desire that its exclusion of minerals from the grant should be defeated, which it is impossible to admit" (p. 318); and, again, "To incorporate the term 'known' into the act and add it to the description of the mineral excepted would also contravene a settled rule in the construction of grants like the one before us, that nothing will pass to the grantee by implication or inference, unless essential to the use and enjoyment of the thing granted, and that exceptions intended for the benefit of the public are to be maintained and liberally construed" (p. 319).

If any title at all to the tracts in controversy passed to the company by virtue of the terms used in the granting clause of the act of 1864 upon the definite location of the line of route, it was a legal title as distinguished from an equitable or inchoate interest. *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241–247. But such a title did not and could not pass in this case if at the very moment of definite location the tracts involved were *sub judice*, under a process then running for the determination of the rights thereto of third persons claiming them by virtue of compliance with the mineral laws.

Ryan *v.* Railroad Co., 99 U. S. 382.

In the progress toward the completion of a mineral claim there are two states of the title, each assured and protected by law. 1st. Title by possession, which vests upon the discovery of minerals in the soil, followed by the act of location. The sole condition requisite to its maintenance is the annual expenditure in its improvement of the sum of $100 (R. S. sec. 2324). There is no period put to its con-

tinuance. It may pass by will or sale. The claimant in possession may, upon the showing of the expenditure of $500 in labor or improvements on the claim, and the fulfilment of the conditions prescribed in sec. 2325 of the Revised Statutes, demand a patent for his tract; but, if he so elect, he may rest indefinitely on his possessory title. 2d. Title by patent, which issues on compliance with statutory requirements.

Title by possession is good against all the world. The Government cannot lawfully interfere with it, and will not brook interference on behalf of others until it reaches that stage where, application for patent having been made, a protest is filed charging non-compliance with the law on the part of the applicant, or that the land is not mineral in character. Mining claims asserted adversely to an applicant's possessory rights are relegated to the courts. (Rev. Stats., sec. 2326.)

The privilege of holding and owning by possession only is not mere favor. It is in recognition of the fact that exploration which seemed warranted by the discovery of traces of the precious metals may not lead to assured results for a long period of time; and it becomes to the interest of the United States to extend its protection to any citizen who is willing to take the risks and spend his money involved in such work.

In Black v. Elkhorn Mining Co. (163 *U. S.* 445, 450) the court said:

"To sum up as to the character of the right which is granted by the United States to a locator, we find: (1) That no written instrument is necessary to create it. Locating upon the land and continuing yearly to do the work provided for by the statute gives to and continues in the locator the right of possession as stated in the statute

(2) This right, conditional in its character, may be forfeited by the failure of the locator to do the necessary amount of work, or if, being one among several locators, he neglects to pay his share for the work which has been done by his co-owners, his right and interest in the claim may be forfeited to such co-owners under the provisions of the statute. (3) His interest in the claim may also be forfeited by his abandonment, with an intention to renounce his right of possession."

The rule is that it is not the ultimate validity of a claim, *but the fact of its existence,* which determines whether or not its effect is to take a given tract out of the category of public lands.

Newhall *v.* Sanger, 92 U. S. 761.

The claim of a defeated litigant is not unlawful. There is no authority to insert the word "lawful" or "valid" before the word "claim," or to hold that these words, or either of them, must be supposed before "location," when that form of claim or title is alleged in bar of a contention that lands are public in character, in order to change the meaning of a statute and enlarge a grant.

Newhall *v.* Sanger, *supra.*

Whitney *v.* Taylor, *supra.*

But, as we have seen, the claim of title here interposed is not merely colorable, nor under the issue raised by the demurrer is the good faith or apparent validity of the mineral locations brought into question.

Section 2322 of the Revised Statutes confers upon the locator of a mining claim "the exclusive right of possession and enjoyment" of the located tract. This is in the nature of a legislative grant of an interest in the land.

The Government thereafter holds the title in trust for the locator.

Noyes *v.* Mantle, 127 U. S. 348.
Forbes *v.* Gracey, 94 U. S. 762.
Jennison *v.* Kirk, 98 *id.* 453.

In *Erhardt* v. *Boaro* (113 U. S. 527), this court said (p. 535): "In all legislation, whether of Congress or of a State or Territory, and by all mining regulations and rules, discovery and appropriation are recognized as the sources of title to mining claims, and development by working as the condition of continued ownership until a patent is obtained."

We have called attention to the erroneous statement at page 17 of the brief for plaintiff in error that the placer locations set up in the answer to the amended petition were "admittedly without discovery of mineral."

We repeat here the allegation of that answer, which is that the locators—

"had discovered mineral thereon, and had located said quarter section as mineral land, and claimed the same as such for valuable mineral deposits therein."

Record, p. 17.

The company's demurrer admitted this. We have heretofore quoted from the said amended answer the admission made upon the subject of the mineral character of the lands, which is that, upon the issue tried in the Land Department, they were determined to be not commercially valuable for their minerals.

There has been some confusion in construing and attempting to harmonize the decisions of the courts upon the question of what constitutes a "valuable mineral deposit" in the sense of section 2319, R. S.; a valid "min-

ing claim" in the sense of section 2320; of land claimed and located for valuable deposits in the sense of section 2325, and of lodes "known to exist within the boundaries of a placer claim" in the sense of section 2333, Revised Statutes.

The apparent confusion has arisen from failing to distinguish between controversies which deal only with the incident necessary to create the estate which follows from, and stands only upon, a location, and that which is created by the showings necessary to prove a right to take a patent, and the estate vested by such patent.

The authorities in which these questions have been discussed have generally related to lode claims; and those which have been most prominent have arisen in the pursuit of rights under section 2333, wherein a patented placer claim has been assailed on the ground that it contained a vein or lode *which was known to exist within the boundaries of the placer* at the time a patent was applied for; or where mineral claims have been asserted within an entered or patented town site, the crucial question in such cases being what constitutes a *known vein or lode* in the sense of that section or in the sense of the mineral exceptions found in town-site acts. Such was the issue in—

United States *v.* Iron Silver Min. Co., 128 U. S. 673.
Iron Silver Min. Co. *v.* Mike & Starr Co., 143 U. S. 394.
Davis, Adm., *v.* Weibold, 139 U. S. 628.

In such controversies, involving, as they do, an assault upon the validity of an outstanding patent of the United States, proofs certain and ample have been required to establish the existence of a known vein or lode, including the extent or commercial value of the minerals contained in it.

But where the question at issue has been the requisites of a vein which justify a *location only*, under section 2320, they are different.

But slight indications of a defined and mineral-bearing ledge have been held sufficient to support a location.

"A valid location of a mining claim may be made whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following it in expectation of finding ore, and that a valid location may be made of a ledge deep in the ground and appearing at the surface, not in the shape of ore, but in vein matter only," is held in Burke *v.* McDonald (Idaho), 29 Pac. 101; Harrington *v.* Chambers (Utah), 1 Pac. 375 (affirmed, 111 U. S., 350, 356; Eilers *v.* Boatman *et al.*, 111 *id.* 356); Book *v.* Justice Min. Co., 58 Fed. 106, 120.

In Book v. *Justice Min. Co., supra*, the learned circuit court denied the theory propounded in that case, that a discovery was insufficient, unless it developed a property that would pay the expenses of mining it. Said the court, "If this view should be sustained, it is manifest that it would lead to absurd, injurious, and unjust results, destruction of the rights of prospectors and miners, in their honest, patient, and industrious efforts to explore, discover, and develop the veins and lodes that exist in the public mineral lands of the United States" (p. 124). At p. 125 the court further said, the act of Congress "does not impose any conditions as to the value or extent of the ore." It simply provides that "no location of a mining claim shall be made until the discovery of a vein or lode within the limits of a claim located" (R. S., sec. 2320). At page 120 the rule is laid down that "when the locator finds rock in place, containing mineral, he has made a discovery, within the meaning of the statute, whether the

rock or earth is rich or poor, whether it assays high or low."

To the same effect is *Montana Cent. Ry. Co.* v. *Migeon*, 68 Fed. 811, 814; North Noonday Co. *v.* Orient Min. Co., 6 Saw. 308; 1 Fed. 522; Jupiter Min. Co. *v.* Bodie Consol. Co., 11 Fed. 675; Mining Co. *v.* Cheesman, 116 U. S. 535–536.

In *Gregory* v. *Pershbaker* (14 Pac. 401, 404) the supreme court of California, whose decisions upon mining questions are of high authority, went so far as to hold that, as to placer claims, there is no condition in the acts of Congress, in the local laws, or in the practice of miners which requires the actual discovery of valuable minerals before valid location can be made.

The Land Department entertains contests brought between agricultural and mineral claimants to determine issues raised as to the relative value of given tracts for mining or agricultural use. As to lands within railroad limits which, at date of definite location, were free from claims, but subsequently located as mineral land, the company will be heard as a contestant to sustain a contention that as a present fact the tract is most valuable for agriculture.

Walton *v.* Batten *et al.*, 14 L. D. 54.
Peirano *et al. v.* Pendola, 10 L. D. 536.
Savage *v.* Boynton, 12 L. D. 612.

But a judgment at a hearing that a specific tract in railroad limits is in fact agricultural does not preclude a subsequent inquiry as to the mineral character of the tract on the protest of a mineral claimant.

Burnstetter *v.* Central Pac. R.R. Co., 21 L. D. 464.
Searle Placer, 11 L. D. 441.

Applications filed in the Land Department to make entry of mineral lands which are otherwise regular proceed to patent as matter of course on proof only of the original discovery which warranted the location. Proof of the quantity or value of the deposit is not required.

In *Tam. et. al.* v. *Story* (21 L. D. 440–1), the Commissioner had held that "the discovery of a vein, whether rich or poor, great or small, will warrant the miner in making a location, for otherwise he might not be able to secure the award of his labor, but before making entry it must be shown that the claim contains a valuable deposit of mineral." Referring to this position of the Commissioner, the Secretary said: "I do not concur in that statement of the law. There must be a discovery before location. (Section 2320, Revised Statutes; Waterloo Mining Company *v.* Doe, 17 L. D. 111.) But after discovery and location a subsequent compliance with the provision of section 2325 of the Revised Statutes entitles the explorer to patent, and no showing beyond his first discovery is required by the mining laws or the regulations or decisions of this Department. Indeed, after discovery and location, this Department has held that "his right of possession is as complete as if he had a Government patent, provided he continues to put each year the required amount of labor and improvements thereon" (Branagan *v.* Dulaney, 2 L. D. 744), and the Supreme Court of the United States has held that so long as he complies with the statute as to annual labor and improvement, his title is "the highest known to the law." Evidently, then, the value of the mineral deposit is a matter into which the Government does not inquire after discovery and locacation, save in a controversy between mineral and agricultural claimants. If the explorer deemed the deposit of sufficient value to warrant the annual labor and en-

penditure required, he thereby shows his good faith, and a compliance with the other provisions of section 2325, Revised Statutes, entitles him, on application, to entry and patent."

The applications for patent set up in the answer to the amended complaint were in full compliance with law and regulations. Under the practice of the Land Department as declared in *Tam. et al.* v. *Story*, *supra*, the applicants were entitled to patent. They were defeated by the intervention of the company, which protested the mineral quality of the land and "the commercial value of the gold or other precious metals contained therein." (Record, p. 18.)

The company, under the practice then prevailing, was allowed to appear as a party in interest and to produce testimony in support of its contention. At a later day, and since the corrective decisions of this court have been apprehended, the claims in controversy having had their inception before definite location, the company would not have been heard, and, in default of other protestants entitled to intervene, patents must have been awarded to the several locators.

Counsel for plaintiff in error refer with reliance to the act of February 26, 1895, providing for the examination and classification of certain mineral lands in Montana and Idaho. (28 Stats. 683.)

That act is notable as being the first attempt made by the United States, through its own agents, to identify and segregate the public mineral lands. The act is in aid of the final adjustment of the Northern Pacific grant.

The plain implications of its third section are that the Congress which passed it held to the view that no rights had passed to the company by any previous legislation which in anywise restricted the full operation of the mineral laws within the grant limits.

It assumes the fact that, notwithstanding the grant, lands within its description containing valuable mineral deposits "are open to exploration, occupation, and purchase under the provisions of the United States mining laws," and this notwithstanding the definite location of a line of land-grant road.

It negatives the under current of the contention of plaintiff in error that only such mineral lands as are proven to contain *paying mines* are within the exception to its grant, for it directs that land shall be classified as mineral upon consideration of mineral discovered or developed on adjacent land, and upon "reasonable probabilities" of such land containing valuable mineral deposits because of its formation, location, or character.

The concluding paragraph of said section 3 is: "When mining locations have been heretofore made or patents issued for mining ground in any section of land, this shall be taken as *prima facie* evidence that the forty-acre subdivision within which it is located is mineral land:"

The effect of this provision is to declare that in the judgment of Congress a mining location, equally with a patent issued for mining ground, is of such significance as not only to take the land covered by it out of the purview of the grant, but sufficient also to impress the mineral character upon the remainder of the forty-acre tract in which it is situated.

The act deals with the lands embraced by the primary and indemnity limits of the grant to the end that tracts mineral in character may be classified as such, and the claims or filings upon them by the railroad company be "rejected, cancelled, and disallowed." (Sec. 1.)

There is nothing in the statute which indicates a purpose to restore to the grant tracts which at definite location were for any cause excepted therefrom.

As descriptive of rights in connection with the public lands, the word "claim" is often used in merely inceptive proceedings, as, for instance, in connection with the mere filing of a pre-emption declaratory statement. The authorities cited show it to be settled law that a mineral claim has in it all the elements of a vested estate.

In *Prigg* v. *Pennsylvania* (16 P. 615) a "claim" is defined thus: "It is in a just and judicial sense a demand of some matter, as of right, made by one person on another to do or forbear some act or thing as a matter of duty."

The *Standard Dictionary* defines the word: 4. "Anything that is claimed; especially a tract of Government land to which a settler lays claim by virtue of occupancy or by other right; also, a region or tract claimed for mining."

In Whitney *v.* Taylor (45 Fed. 616, 617) it was said: "The word 'claim' as used in the act was not intended to be restricted to such homestead and pre-emption claims as should afterwards ripen into perfect title, but was intended to include all claims that were made in such form as to be recognized and allowed by the Land Office without any regard to the question whether they were valid at the time of filing or whether they were afterwards perfected, abandoned, cancelled, or forfeited."

That case was brought here on writ of error and is reported in 158 U. S. 85. It contains the latest expression by this court on the subject.

In that case it stands decided, as often before held, that "The condition of the title at the date of definite location determined the question as to whether the land passed to the railroad company or not."

That it is the *attachment* of a claim to a tract of land which excepts it from a grant, and that with the performance of after conditions necessary to make the attach-

ing title good the company had nothing to do, its interest having ceased upon the attachment of the claim "as much as if in a deed it had been excluded from the conveyance by metes and bounds" (p. 89).

That the principle to be deduced from such cases as Kansas Pacific Ry *v.* Dunmeyer, Hastings & Dakota Ry. *v.* Whitney, Barden *v.* Northern Pacific Ry., and Newhall *v.* Sanger, is, "that when on the records of the local land office there is an existing claim on the part of an individual under the homestead or pre-emption law, which has been recognized by the officers of the Government and has not been cancelled or set aside, the tract in respect to which that claim is existing is excepted from the operation of a railroad land grant containing the ordinary excepting clauses, and this notwithstanding such claim may not be enforceable by the claimant and is subject to cancellation by the Government at its own suggestion or upon the application of other parties.

"It was not the intention of Congress to open a controversy between the claimant and the railroad company as to the validity of the former's claim. It was enough that the claim existed, and the question of its validity was a matter to be settled between the Government and the claimant, in respect to which the railroad company was not permitted to be heard" (p. 92–'3).

If the claim of the mineral locators was void *ab initio*, that must have been a fact *ab initio* as certainable. But confessedly it required investigation and the weighing of evidence as to whether it was or was not mineral land in the largest and ultimate sense of being commercially valuable as a mine and entitled to go to patent.

As a claim the recitals of the answer show it to have been valid and complete. It was held to be sufficient by the local land officers as to the demands, allegations, and

proofs which, by law and regulations, are requisite to the admission to record of mining claims, and sufficient to impose upon them the duty under section 2325, R. S., of publishing the notice therein prescribed which puts a period to the right of adverse claimants to appear and intervene in the controversy. It is held in the Land Department that a claim so filed "is *per se* a segregation of the land covered thereby."

Sec'y Smith in Gibson's case, 21 L. D. 219.

The issue which was afterwards raised by the protests of the plaintiff company was upon matter of fact only. In such controversies the decision is binding upon the parties to them, but not necessarily correct and in accord with the very truth of facts. There may have been failure on the part of the claimants to produce evidence which was really in existence; their operations may have stopped just short of a point where paying deposits would have been reached. The register and receiver who were the jury in the case, as well as the court, may have had a standard of commercial value higher than was just; deposits which, under the methods of mining and extraction prevailing at one period, are regarded as without value, under later and improved methods become capable of yielding a profit. Many abandoned locations are afterwards developed into paying properties by miners of larger means and energies. The finding of the Land Department to-day in a pending controversy, that the claimants have not established the mineral character of a given tract, does not, so long as it remains public land, withdraw it from the class of land "free and open to exploration," nor in the least impair the right of the later successful explorer to take final title to it as mineral land. There can therefore be no warrant for the contention that a non-mineral finding in patent

proceedings must be accepted as a judgment that the claim on which they were predicated was at any stage of its progress void.

The case of the company in Hastings & Dakota R.R. Co. *v.* Whitney (*supra*) proceeded very much on these lines, but the court did not give them its sanction.

The contention of plaintiff in error, taken at p. 17 of its brief, that in the administration of the grant distinction must be made "between lands not granted at all by reason of their character or location and lands which, though *prima facie* granted, were excepted therefrom by reason of claims existing and undetermined at date of definite location," is more specious than sound. Lands falling within any or either of the exceptions embodied in the grant are lands not granted at all. We have seen that in *Whitney* v. *Taylor*, *supra*, it was held that a claim evidenced by a "proceeding in the proper land office by which the inchoate right to the land was initiated * * * was excepted out of the grant as much as if in a deed it had been excluded from the conveyance by metes and bounds."

In any event the contention can avail nothing, unless the further position be maintainable that a mineral claim, unlike every other assertable under the laws of the United States, does not *attach to the land*, for only such lands were granted "to which the United States have full title" at date of definite location.

By the contract between the Government and the company involved in the third section of the act of 1864 the United States agreed to give, and the company agreed to receive, a valuable consideration by way of indemnity for the exclusion of the latter from any interest in tracts or in controversies concerning them to which at definite location the title of the United States (not of the company) was not clear. If found to be reserved, appropri-

ated, or "otherwise disposed of" at that time, or if preemption, homestead, or other claims or rights had then attached, other tracts were "to be selected by said company in lieu thereof." This insured the absolute impartiality of the tribunal, though it was that of the United States, for as to the company and the Government the denial of right to one tract was the award of another, and there remained an unprejudiced and untrammeled forum within which the citizen claimant under the public land laws could pursue his remedy.

The questions raised by the specifications of error seem to us to have been already decided in this court, and against the views urged by the plaintiff in error, and that the judgment below must be affirmed.

Respectfully submitted.

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